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## A Right to Know How You'll Die: A First Amendment Challenge to State Secrecy Statutes Regarding Lethal Injection Drugs

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## **A RIGHT TO KNOW HOW YOU'LL DIE: A FIRST AMENDMENT CHALLENGE TO STATE SECRECY STATUTES REGARDING LETHAL INJECTION DRUGS**

Kelly A. Mennemeier\*

*In the years since 2008, when the Supreme Court upheld the constitutionality of a commonly used lethal injection protocol in Baze v. Rees, states have shifted away from the approved protocol and turned towards new drugs, drug protocols, and drug sources to carry out state-sponsored executions by lethal injection. Even as states have shifted to new, untested protocols and less-regulated sources than they used in pre-Baze years, state legislatures have enacted and amended secrecy statutes that hide information about the drug protocols and sources of lethal injection drugs from the press, the public, and condemned prisoners. Meanwhile, a number of recent executions have gone awry, with executions lasting far longer than expected or causing apparent pain in prisoners being executed.*

*State secrecy about execution protocols and drug sources makes it difficult for condemned prisoners to argue about the constitutionality of execution by particular drugs, and prevents the press and the public from evaluating whether lethal injection executions are ethically or constitutionally permissible depending on the drugs being used (and the drugs' quality and quantity). This Comment argues that state secrecy statutes concerning lethal injection drugs are unconstitutional because they impose on the public's presumptive right of access to state-held information of this sort. The Comment explores how the public's right of access derives from the First Amendment, and argues that secrecy laws about lethal injection drug sources and protocols impermissibly burden the public's right of access to that information.*

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## INTRODUCTION

In January 2014, the Louisiana Department of Corrections (DOC) was having trouble. It was preparing for an execution scheduled for early February 2014, but the DOC's supply of pentobarbital, one of the three drugs required in the state's lethal injection protocol, had expired several months prior.<sup>1</sup> Moreover, the DOC was struggling to find another source for the drug, as most drug manufacturers refuse to sell to prisons that conduct executions.<sup>2</sup> Nine days before the scheduled execution, the state announced a change to the state-approved drug protocol; the Louisiana DOC no longer needed pentobarbital, as the new protocol allowed the execution to be conducted with only two drugs.<sup>3</sup> The state had one of the drugs: midazolam.<sup>4</sup> Five days before the execution, the DOC announced it had obtained the other drug as well: hydromorphone.<sup>5</sup> But the DOC refused to say where it had obtained the drug. According to the DOC, the source of the drugs was confidential and protected even from the condemned prisoner's lawyers.<sup>6</sup>

Several months later, two sources came forward, revealing that the second of the two drugs, the hydromorphone, had been obtained from a Louisiana hospital.<sup>7</sup> The hospital insists it was unaware the drugs it was providing would be used for an execution.<sup>8</sup> Ulysses Gene Thibodeaux, Chief Justice of the Third Circuit Court of Appeals and also a board member for the hospital, stated, "Had we known of the real use . . . we never would have [provided the prison with the drugs]."<sup>9</sup>

The Louisiana DOC's secrecy apparently kept even its supplier in the dark about its role in a state execution.<sup>10</sup> Still, Louisiana lawmaker, Senator Joe Lopinto, proposed a bill to protect supplier information even more closely.<sup>11</sup> Senator Lopinto's proposed secrecy statute would have required

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<sup>1</sup> Della Hasselle, *In Rush to Find Lethal Injection Drug, Prison Officials Turn to a Hospital*, THE LENS (Aug. 6, 2014), <http://thelensnola.org/2014/08/06/lake-charles-memorial-hospital-sold-execution-drug-to-state/>.

<sup>2</sup> *Id.*; see also John Ericson, *Botched Execution Shows Perils of Lethal Injection Drug Shortage*, NEWSWEEK (Apr. 30, 2014), <http://www.newsweek.com/2014/05/16/states-go-great-lengths-find-lethal-injection-drugs-249154.html>.

<sup>3</sup> Hasselle, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Ed Pilkington, *Louisiana Shelves Execution Secrecy Law*, GUARDIAN (June 2, 2014),

“the name, address, qualifications, and other identifying information of any person or entity that manufactures, compounds, prescribes, dispenses, supplies, or administers the drugs or supplies utilized in an execution” to remain confidential.<sup>12</sup> Moreover, such information would not be discoverable or admissible as evidence in any proceeding.<sup>13</sup> Ultimately, Senator Lopinto withdrew the bill.<sup>14</sup> But many other states continue to shroud information about executions—particularly information about drug sources and execution protocols—under a veil of secrecy.<sup>15</sup>

Lethal injection has been a permissible means of executing condemned prisoners in the United States since the late 1970s.<sup>16</sup> In 2008, the Supreme Court upheld the constitutionality of the traditional three-drug protocol (sodium thiopental, pancuronium bromide, and potassium chloride) used by many states for executions in *Baze v. Rees*.<sup>17</sup> Since the *Baze* decision, however, shortages in the supply of *Baze*-approved drugs have forced state DOCs to seek alternative sources of execution drugs.<sup>18</sup> As states’ drug supplies have run out or expired, U.S. prisons have increasingly turned to new drugs, sought to obtain drugs from unapproved or illegal sources, or looked to compounding pharmacies to procure the drugs.<sup>19</sup> Thus, the drugs currently used tend to come from less regulated sources than they had when *Baze* was decided.<sup>20</sup> The new protocols and drug sources create a serious risk that executions may be conducted in a manner that causes condemned prisoners excruciating pain as they die.<sup>21</sup>

As prisons have turned to new protocols and drug sources, states have

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<http://www.theguardian.com/world/2014/jun/02/louisiana-lawmakers-tough-execution-secrecy-law>; see also *infra* Part II.A.

<sup>12</sup> Pilkington, *supra* note 11; H.B. No. 328, Reengrossed, Reg. Sess. (La. 2014).

<sup>13</sup> *Id.*

<sup>14</sup> Pilkington, *supra* note 11.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> Deborah Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 373–74 (1997). Oklahoma was the first state to adopt lethal injection, which it did for economic and humanitarian reasons on May 11, 1977; Texas followed suit the next day, and Idaho and New Mexico adopted lethal injection shortly thereafter. *Id.* at 375. Lethal injection was not actually used in an execution until 1982, in Texas. *Id.*; see also *So Long as They Die*, 18 HUM. RTS. WATCH 1, 10 (2006).

<sup>17</sup> 553 U.S. 35, 44, 62 (2008) (plurality opinion).

<sup>18</sup> Mary Fernandez, *Executions Stall as States Seek Different Drugs*, N.Y. TIMES, Nov. 9, 2013, at A1.

<sup>19</sup> *Id.*; Ericson, *supra* note 2; see *infra* Part I.B. for an explanation of compounding pharmacies.

<sup>20</sup> *Id.*; see also *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Jan. 8, 2016).

<sup>21</sup> See *infra* Part I.C for examples.

passed, amended, or reinterpreted statutes to make information about the drugs and execution protocols unavailable to condemned prisoners and their attorneys, the public, and sometimes even the courts.<sup>22</sup> For instance, many statutes shield information about execution team members—including the identities of the drug suppliers—from public disclosure.<sup>23</sup> Thus under the secrecy statutes, condemned prisoners and the public alike have no means of obtaining information about the source of the drugs being used in executions.

This Comment argues that secrecy statutes that shield information about drug suppliers and protocols are unconstitutional under First Amendment right of access principles. Part I briefly discusses the history of lethal injection in the United States and the impact of drug unavailability on states that utilize lethal injection as a means of execution. It also provides a sampling of recent lethal injection executions that have gone wrong. Part II describes some of the recent changes to state secrecy statutes that shield details about lethal injection drug protocols and drug sources from disclosure and public scrutiny. Part III describes the public's qualified right of access to information under the First Amendment and explores how courts have applied and extended that right to different types of government information.

Finally, Part IV explains that, under the First Amendment, state secrecy statutes are unconstitutional because they attempt to shield information about drug protocols and drug sources to which condemned prisoners and the public have a right of access. This part applies an existing right of access test to the execution-related information protected by state secrecy statutes. It also examines several recent and pending cases in which plaintiffs have advanced First Amendment right of access arguments.

## I. HISTORY OF LETHAL INJECTION

Section A examines the evolution of the traditions surrounding executions. The section documents the shift from executions as highly public events to proceedings shrouded with secrecy. Additionally, it considers the growing demand for executions that comport with “evolving standards of decency,”<sup>24</sup> and how those standards resulted in lethal injection becoming the United States' primary method of executing condemned

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<sup>22</sup> See, e.g., *infra* Appendix; see also *Glance: Execution Drug Secrecy in 5 States*, ASSOCIATED PRESS (Apr. 5, 2014), <http://bigstory.ap.org/article/glance-execution-drug-secrecy-5-states>.

<sup>23</sup> See *infra* Part II.A.

<sup>24</sup> *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

prisoners.

Section B addresses problems states have had over the past five years in securing approved execution drugs. As large pharmaceutical companies have ceased production of popular execution drugs, states have turned to less-regulated sources, such as compounding pharmacies, for their drug supply. Additionally, states have amended their approved drug protocols to allow for use of new drugs and drug combinations in executions.

Finally, Section C details a series of recent botched executions across the country. The problems with these executions highlight the need for information about the drug sources and drugs used by states in executions, since flawed drugs could make executions unconstitutionally cruel and unusual.

#### A. A BRIEF HISTORY OF STATE-SPONSORED EXECUTION AND THE DEVELOPMENT OF LETHAL INJECTION

While traditions surrounding executions have evolved over history, executions are, at their core, public events. Executions are conducted by the state on behalf of the public, with the sanction of the public. The public receives notice of executions. And the public has historically had the ability to see executions carried out. Over time, the public's "notions of decency" as to appropriate methods of execution has evolved. Executions have become increasingly sanitized and bloodless. With the advent of lethal injection, executions gained the nearly innocuous appearance of medical procedures. But the shift toward medicalized executions has made the means of execution opaque. This section examines the history of executions as a backdrop to this Comment's later argument, *infra* Part IV.A., that a history of access to executions exists and is important.

Dating back to the European Middle Ages, state-sponsored executions were traditionally public events.<sup>25</sup> Executions in England attracted "large and disorderly" crowds, some tens of thousands of people large.<sup>26</sup> In the United States, too, state-sponsored executions were initially open to the public.<sup>27</sup> The last public execution in the United States—a hanging—took place in 1937, and drew a crowd of several hundred people.<sup>28</sup> Even once executions moved within prison walls, states implemented procedures ensuring some public access, such as California's requirement that a

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<sup>25</sup> See *id.* at 875 (citing JOHN LAURENCE, A HISTORY OF CAPITAL PUNISHMENT 177–78, 179 (1960)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

minimum of “twelve respectable citizens” be present at every private, state-sponsored execution.<sup>29</sup>

In the early history of the United States, states conducted virtually all executions by hanging.<sup>30</sup> New York authorized the use of electrocution in 1888 in an effort to utilize “the most humane and practical method known to modern science of carrying into effect the sentence of death.”<sup>31</sup> Over the following century, electrocution was the primary method of execution in the United States, though other methods, “including hanging, firing squad, and lethal gas,” were used occasionally.<sup>32</sup> Lethal injection was first proposed as a potential method of execution as early as 1888, but it did not gain traction in the United States until nearly a century later.<sup>33</sup>

In 1972, the Supreme Court decided in *Furman v. Georgia* there needed to be greater consistency in the application of the death penalty.<sup>34</sup> That decision created a de facto moratorium on capital punishment for several years, ending once the Court held in *Gregg v. Georgia* that executions, at least under certain conditions, were constitutional.<sup>35</sup> Then, in 1977, Oklahoma became the first state to adopt lethal injection as an execution method, followed by nineteen other states within a decade.<sup>36</sup> The first execution using lethal injection took place in Texas in 1982.<sup>37</sup>

At its advent, lethal injection was seen as a “more humane” and less brutal means of execution than methods such as the firing squad, the electric chair, or the gas chamber.<sup>38</sup> Today, lethal injection is the sole or

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<sup>29</sup> *Id.*

<sup>30</sup> *Baze v. Rees*, 553 U.S. 35, 41 (2008).

<sup>31</sup> *Id.* at 42 (quoting *Glass v. Louisiana*, 471 U.S. 1080, 1082 (1985) (Brennan, J., dissenting from denial of certiorari)).

<sup>32</sup> *Id.* at 42.

<sup>33</sup> Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 90–91 (2002).

<sup>34</sup> 408 U.S. 238, 240 (1972) (per curiam).

<sup>35</sup> 428 U.S. 153, 195 (1976) (plurality opinion); see Denno, *supra* note 33.

<sup>36</sup> Denno, *supra* note 33, at 92. Oklahoma and Texas both adopted lethal injection in 1977; Idaho in 1978; New Mexico in 1979; Washington in 1981; Massachusetts in 1982; Arkansas, Illinois, Montana, Nevada, New Jersey, North Carolina, and Utah in 1983; Mississippi, Oregon, South Dakota, and Wyoming in 1984; and Delaware and New Hampshire in 1986. Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1341 (2014) [hereinafter Denno II].

<sup>37</sup> *Beardslee v. Woodford*, 395 F.3d 1064, 1073 (9th Cir. 2005).

<sup>38</sup> *So Long as They Die*, *supra* note 16, at 10; see also Nathaniel A.W. Crider, Comment, *What You Don't Know Will Kill You: A First Amendment Challenge to Lethal Injection Secrecy*, 48 COLUM. J.L. & SOC. PROBS. 1, 8 (2014). However, not all judges agree that lethal injection causes an execution to be more humane or less brutal. In a recent, widely



primary method of execution in every state that authorizes capital punishment.<sup>39</sup>

Dr. Stanley Deutsch, the head of the Oklahoma Medical School's Anesthesiology Department, suggested the drugs that comprised Oklahoma's first lethal injection protocol.<sup>40</sup> Deutsch recommended intravenously administering "an ultra short acting barbiturate" (e.g., sodium thiopental) as an anesthetic in "combination" with a "neuromuscular [sic] blocking drug" (e.g., pancuronium bromide) to paralyze the body.<sup>41</sup> Oklahoma's protocol adopted both recommendations and added a third chemical, potassium chloride, which induces cardiac arrest.<sup>42</sup> In 2008, the Supreme Court held in *Baze v. Rees* that the three-drug protocol satisfies the Eighth Amendment and is therefore constitutional.<sup>43</sup> At the time the Court

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publicized dissent from the Ninth Circuit's decision not to rehear en banc a decision regarding an Arizona execution, Judge Alex Kozinski laid out the argument that the decision to use lethal injection for executions is inherently flawed:

Until about three decades ago, executions were carried out by means designated for that purpose alone: electric chairs were the most common, but gas chambers, hanging and the occasional firing squad were also practiced. . . .

Whatever the hopes and reasons for the switch to drugs, they proved to be misguided. Subverting medicines meant to heal the human body to the opposite purpose was an enterprise doomed to failure. . . .

. . . Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final moments. But executions are, in fact, nothing like that. They are brutal, savage events, and nothing the state tries to do can mask that reality. . . .

If some states and the federal government wish to continue carrying out the death penalty, they must turn away from this misguided path and return to more primitive—and foolproof—methods of execution. . . . If we, as a society, cannot stomach the splatter from an execution carried out by a firing squad, then we shouldn't be carrying out executions at all.

*Wood v. Ryan*, 759 F.3d 1076, 1102–03 (9th Cir. 2014) (Kozinski, J., dissenting from the denial of rehearing en banc) (citations omitted).

<sup>39</sup> *Methods of Execution*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/methods-execution> (last visited Jan. 9, 2016). Two of those states, New Mexico and Nebraska, have abolished the death penalty; however, their laws do not apply retroactively. *Id.*

In certain states, condemned prisoners may choose their method of execution. *Id.* For instance, California prisoners can request lethal gas instead of the default, lethal injection; Florida, South Carolina, and Virginia prisoners may choose between lethal injection and electrocution; and Washington prisoners can request hanging instead of the default, lethal injection. *Id.*

<sup>40</sup> Denno, *supra* note 33, at 95 n.207.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 97–98.

<sup>43</sup> *Baze v. Rees*, 553 U.S. 35, 53–54 (2008).

decided *Baze*, the three-drug protocol had been in use by at least thirty of the thirty-six states that then authorized capital punishment.<sup>44</sup>

#### B. PROBLEMS WITH OBTAINING EXECUTION DRUGS

A year after the *Baze* decision, the sole manufacturer of sodium thiopental in the United States stopped producing the drug.<sup>45</sup> As prison drug supplies began dwindling or expiring, prison officials scrambled to find other sources for execution drugs.<sup>46</sup> Some legal observers reported that states illegally bartered for drugs.<sup>47</sup> Other states turned to foreign sources to obtain sodium thiopental, or, when that proved too hard to acquire, pentobarbital, a muscle paralytic.<sup>48</sup> Concerns about improper importation of sodium thiopental led the Drug Enforcement Agency to seize the drug from several states in 2011.<sup>49</sup> Later that year, the European Union implemented a

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<sup>44</sup> *Id.* at 44.

<sup>45</sup> Erik Eckholm & Katie Zezima, *States Face Shortage of Key Lethal Injection Drug*, N.Y. TIMES (Jan. 21, 2011), <http://www.nytimes.com/2011/01/22/us/22lethal.html>. Italian authorities refused to allow export of the drug from the manufacturer's Italy plant out of concern that the drug might be used in executions. *Id.* In 2011, the company, Hospira, Inc., announced it was exiting the sodium thiopental market due to the fear of liability in Italy and the inability to prevent the drug from use in capital punishment by departments of corrections. Press Release, Hospira, Inc., Statement From Hospira Regarding its Halt of Production of Pentothal™ (sodium thiopental) (Jan. 21, 2011), <http://www.deathpenaltyinfo.org/documents/HospiraJan2011.pdf>.

<sup>46</sup> Ericson, *supra* note 2.

<sup>47</sup> *E.g., id.* (suggesting that states have turned to the Indian black market); Katy Lohr, *Georgia May Have Broken Law by Importing Drug*, NAT'L PUB. RADIO (Mar. 17, 2011), <http://www.npr.org/2011/03/17/134604308/dea-georgia-may-have-broken-law-by-importing-lethal-injection-drug> (reporting that Georgia's Department of Corrections obtained sodium thiopental from an unlicensed drug distributor in London).

<sup>48</sup> Eckholm & Zezima, *supra* note 45 (reporting that California and Arizona sought out sodium thiopental from England). In 2010, the UK banned the exportation of sodium thiopental to the United States, after realizing that U.S. prisons were using the drug in executions. Pete Walker, *Vince Cable Restricts Export of Drug Used in U.S. Executions*, GUARDIAN (Nov. 29, 2010), <http://www.theguardian.com/science/2010/nov/29/sodium-thiopental-export-restrictions>. The following year, the Denmark-based company Lundbeck, Inc. implemented distribution restrictions on its sale of pentobarbital, stating: "Lundbeck adamantly opposes the distressing misuse of our product in capital punishment." Press Release, H. Lundbeck A/S, Lundbeck Overhauls Pentobarbital Distribution Program to Restrict Misuse (Jan 7, 2011), <http://www.deathpenaltyinfo.org/files/LundbeckPR070111.pdf>; see Ericson, *supra* note 2.

<sup>49</sup> Ericson, *supra* note 2; see CONSTITUTION PROJECT, IRREVERSIBLE ERROR: RECOMMENDED REFORMS FOR PREVENTING AND CORRECTING ERRORS IN THE ADMINISTRATION OF CAPITAL PUNISHMENT 145–56 (2014), [http://www.constitutionproject.org/wp-content/uploads/2014/06/Irreversible-Error\\_FINAL.pdf](http://www.constitutionproject.org/wp-content/uploads/2014/06/Irreversible-Error_FINAL.pdf) (noting that sodium thiopental was seized from or voluntarily turned over to the federal government by Alabama,

total prohibition on exportation of drugs or medicinal products that could be used for state-sponsored executions in the United States.<sup>50</sup> States responded to the ensuing drug shortage by turning to compounding pharmacies and by altering state drug protocols.<sup>51</sup>

Most prisons that conduct executions now rely on domestic compounding pharmacies for the requisite drugs.<sup>52</sup> Compounding pharmacies combine, mix, or otherwise alter the ingredients of commercially-available drugs to create medications tailored to the needs of patients who cannot use drugs approved by the Food and Drug Administration (FDA), perhaps because of an allergy or a need for a medicine in a liquid form that is otherwise unavailable.<sup>53</sup> Unlike traditional pharmacies, which supply drugs only in FDA-approved forms, compounding pharmacies generally fall outside the purview of the FDA.<sup>54</sup> Instead, state pharmacy boards regulate compounding pharmacies, and these regulations vary from state to state.<sup>55</sup>

According to the FDA, compounding pharmacies have exploited their lack of regulatory oversight on numerous occasions.<sup>56</sup> For instance, compounding pharmacies have been caught “selling copies of commercially-available drugs” and using “substances that were recalled for safety or effectiveness reasons.”<sup>57</sup> The FDA has also seen “numerous

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Arkansas, Georgia, Kentucky, South Carolina, and Tennessee; the federal government ordered Nebraska to turn over any foreign sodium thiopental but Nebraska refused).

<sup>50</sup> Commission Regulation, 1352/11, 2011 O.J. (L 338) 31. In issuing the amended regulation, the Commission noted:

In some recent cases medicinal products exported to third countries have been diverted and used for capital punishment, notably by administering a lethal overdose by means of injection. The Union disapproves of capital punishment in all circumstances and works towards its universal abolition. The exporters objected to their involuntary association with such use of the products they developed for medical use . . . . It is therefore necessary to supplement the list of goods subject to trade restrictions . . . .

*Id.*

<sup>51</sup> Ericson, *supra* note 2; Michael Rooney, *Lethal Secrecy*, 38 NEWS MEDIA & L., Spring 2014, at 2, <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2014/lethal-secrecy>.

<sup>52</sup> Ericson, *supra* note 2; Rooney, *supra* note 51.

<sup>53</sup> *Compounding and the FDA: Questions and Answers*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm339764.htm> (last updated Oct. 6, 2015).

<sup>54</sup> Ericson, *supra* note 2.

<sup>55</sup> *See Denno II*, *supra* note 36, at 1336.

<sup>56</sup> CONGRESSMAN EDWARD J. MARKEY, COMPOUNDING PHARMACIES COMPOUNDING RISK 3 (2012), [http://interactive.snm.org/docs/Compounding%20Pharmacies%20-%20Compound ing%20Risk%20FINAL\\_0.pdf](http://interactive.snm.org/docs/Compounding%20Pharmacies%20-%20Compound ing%20Risk%20FINAL_0.pdf).

<sup>57</sup> *Id.*

serious violations of good manufacturing practices, including cases where facilities purporting to be sterile were visibly dirty, and cases where contamination of the drug product was known to have occurred.”<sup>58</sup> Compounding pharmacies have abused their lack of regulatory oversight in ways that have impacted the strength, efficacy, and safety of the drugs they supply.<sup>59</sup>

Nevertheless, several states obtain drugs for lethal injection from compounding pharmacies, giving rise to questions regarding the safety and efficacy of those drugs.<sup>60</sup> In March 2015, Georgia discovered the pentobarbital it had obtained from a compounding pharmacy appeared “cloudy.”<sup>61</sup> Georgia prison officials claimed that results of testing on the drug were “within the acceptable testing limits,” but also acknowledged that “the prison was no longer sure which drugs they had examined—‘this week’s or last week’s’—and that they were considering proceeding” with two scheduled executions.<sup>62</sup> After vacillating for several hours about whether to proceed, prison officials decided to postpone because “this particular batch just didn’t come out like it was supposed to.”<sup>63</sup> The same month, a Mississippi judge ordered the Mississippi DOC to release the identity of the compounding pharmacy that supplies the state with pentobarbital.<sup>64</sup> “More than ever,” the judge wrote, “the origin, integrity, and composition of lethal injection drugs is a matter of serious public concern.”<sup>65</sup>

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<sup>58</sup> *Id.* In 2012, contaminated injectable steroids manufactured by New England Compounding Center led to an outbreak of fungal meningitis, which caused more than 300 illnesses and twenty-five deaths across eighteen states. *Id.* at 2.

<sup>59</sup> *Id.*

<sup>60</sup> Rooney, *supra* note 51.

<sup>61</sup> Alan Blinder, *Georgia Postpones 2 Executions, Citing “Cloudy” Drug*, N.Y. TIMES (Mar. 3, 2015), <http://www.nytimes.com/2015/03/04/us/execution-of-georgia-woman-is-postponed-indefinitely.html>. Georgia officials eventually concluded that the drugs were cloudy because they were “too cold” and proceeded to execute Kelly Gissendaner with the same pentobarbital in September 2015. Mark Berman, *Georgia executes Kelly Gissendaner after Supreme Court denies stay requests*, WASHINGTON POST (Sept. 30, 2015 2:33 PM), <http://www.washingtonpost.com/news/post-nation/wp/2015/09/29/georgia-considering-whether-the-state-will-execute-kelly-gissendaner-the-only-woman-on-its-death-row-as-pope-francis-asks-for-mercy/>.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Jeff Amy, *Judge Orders Release of Execution Drug Supplier’s Name*, CLARION-LEDGER (Mar. 6, 2015, 11:19 PM), <http://www.clarionledger.com/story/news/2015/03/07/judge-orders-release-execution-drug-suppliers-name/24548383/>.

<sup>65</sup> *Id.* The judge specifically cited “the visible torture of several condemned prisoners in other states last year in botched executions.” *Id.*

States have responded to drug shortages not only by obtaining drugs from under-regulated sources (like compounding pharmacies) but also by amending drug protocols.<sup>66</sup> Some states have gone from a three-drug protocol to a one-drug or two-drug protocol.<sup>67</sup> Other states have switched from requiring sodium thiopental to requiring pentobarbital or propofol.<sup>68</sup> Florida, Ohio, and Kentucky developed protocols that call for midazolam, a sedative that had never been used in an execution anywhere in the world until a 2013 execution in Florida.<sup>69</sup> Legal scholar Deborah Denno found that states' protocols evolved with "unprecedented" frequency in the five years following *Baze* (2008–2013), changing more in those five years than over the previous thirty years.<sup>70</sup>

The rapid evolution of protocols in some states bespeaks a lack of care in developing safe, efficacious protocols. For instance, in 2007, Florida changed its protocol twice in less than three months.<sup>71</sup> The first change came after a botched execution, but the three medical professionals on the investigatory commission refrained from providing medical advice or consenting to the commission's recommendations about a new drug protocol.<sup>72</sup> When a judge issued an order outlining the weaknesses of the revised protocol, the state, which had anticipated the court's negative reaction to the protocol, issued a new protocol—that same day.<sup>73</sup> Subsequent litigation has revealed flaws in the second revised protocol as well, including inadequate provisions for measuring a condemned prisoner's consciousness and an overly broad span of possible executioners (from physicians to people with minimal medical expertise).<sup>74</sup>

Thus, states now find themselves using drugs from less-regulated sources than they had pre-*Baze*, and some states have turned to new, untested drug protocols for their executions.<sup>75</sup> The reduced levels of regulation and testing raise significant questions about the safety and

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<sup>66</sup> Denno II, *supra* note 36, at 1335.

<sup>67</sup> *See id.* at 1358.

<sup>68</sup> *Id.*

<sup>69</sup> CONSTITUTION PROJECT, *supra* note 49, at 148–49, 153; Bill Cotterell, *Florida Executes Man with New Lethal Injection Drug*, REUTERS (Oct. 15, 2013, 8:01 PM), <http://www.reuters.com/article/2013/10/16/us-usa-florida-execution-idUSBRE99F00020131016>.

<sup>70</sup> Denno II, *supra* note 36, at 1335.

<sup>71</sup> Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, at 100–01 (2007) [hereinafter Denno III].

<sup>72</sup> *Id.* at 113–14.

<sup>73</sup> *Id.* at 100–01.

<sup>74</sup> *Id.* at 101.

<sup>75</sup> *See id.* at 1348–50.

efficacy of the execution drugs used today.

### C. A RECENT HISTORY OF BOTCHED EXECUTIONS<sup>76</sup>

Safety and efficacy concerns about lethal injection drugs are not just theoretical; executions involving lethal injection go awry at significantly higher rates than any other method of execution.<sup>77</sup> The high botch rate of executions by lethal injection raises implications for prisoners' Eighth Amendment rights, but prisoners can only raise claims, and the public can only meaningfully evaluate the appropriateness of lethal injection as a means of execution, when they have access to detailed information about the safety and efficacy of the drugs being used to effect death.

Problems with lethal injection abounded even when states used *Baze*-approved drugs in executions. In a study of executions in the United States between 1900 and 2010, researchers found that 7.12% of lethal injections were botched, compared to an average of 3% botched executions using other methods.<sup>78</sup> Toxicology reports from executed prisoners suggest that many executions by lethal injection, even those that used *Baze*-approved protocols, involved inadequate levels of anesthesia.<sup>79</sup>

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<sup>76</sup> For the purpose of this Comment, the phrase "botched executions" refers to executions involving unanticipated problems, delays, or unnecessary pain for the prisoner.

<sup>77</sup> AUSTIN SARAT ET AL., GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND THE DEATH PENALTY 177 (2014). Botched executions do occur with some other methods of execution. Between 1900 and 2010, 3.12% of executions by hanging (85 executions total), 1.92% of executions by electrocution (84 executions), and 5.4% of lethal gassings (32 executions) were botched. *Id.* No firing squad executions have been botched. *Id.*

Fewer total executions were botched due to lethal injection (75 total) than due to hanging or electrocution, but likely only because lethal injection was used as an execution method for only the last 30 of the 110 years during which botched executions were analyzed, so many fewer deaths by lethal injection took place than executions by other methods. *Id.*

Once lethal injection became the primary means of execution, between 1980 and 2010, lethal injection accounted for 86.5% of executions, and had a botch rate of 7.12%. *Id.* While the percentage of botched executions involving other methods of execution was higher during that time period (17.33% of electrocutions; 30% of lethal gassings), the percentages are skewed by the low numbers of executions using those other methods (150 electrocutions and 10 lethal gassings, compared to 1054 lethal injections). *Id.*

<sup>78</sup> *Id.* See Debbie Siegelbaum, *America's "Inexorably" Botched Executions*, BBC NEWS (Aug. 1, 2014), <http://www.bbc.com/news/magazine-28555978>; see also Roxanne Palmer, *Why Lethal Injections Fail*, WEEK (Aug. 14, 2014), <http://theweek.com/articles/444786/why-lethal-injections-fail>.

<sup>79</sup> Leonidas Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 LANCET 1412 (2005). In a 2005 study, British researchers reviewed toxicology reports for executed American prisoners. *Id.* Of the forty-nine inmates whose records were examined, forty-three had levels of anesthetic lower than what would have been required to perform surgery. *Id.* at 1414. Moreover, twenty-one prisoners had thiopental levels consistent with awareness, suggesting they may actually have been fully conscious when the

In the past year and a half, as states have struggled to obtain lethal injection drugs and amended execution protocols based on their inability to obtain traditional drugs, botched executions appear to have become even more prevalent than before.<sup>80</sup> On October 15, 2013, William Happ became the first prisoner to be executed with the sedative midazolam hydrochloride.<sup>81</sup> Some witnesses reported that Happ “appeared to remain conscious for a greater length of time[,] [] made more body movements after losing consciousness,” and took twice as long to die as people executed using the traditional protocol.<sup>82</sup> On April 29, 2014, Oklahoma used the same drug, midazolam, in the execution of Clayton Lockett.<sup>83</sup> During the course of the execution, Lockett “writhed, moaned, and clenched his teeth,” seemingly conscious, despite the administration of the sedative midazolam.<sup>84</sup> He was pronounced dead forty-three minutes after his execution began.<sup>85</sup> His cause of death was initially determined to be “a massive heart attack,”<sup>86</sup> but an autopsy later concluded that the drugs killed him.<sup>87</sup>

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other drugs were administered. *Id.* The report concluded by noting that “[f]ailures in protocol design, implementation, monitoring and review might have led to the unnecessary suffering of at least some of those executed. Because participation of doctors in protocol design or execution is ethically prohibited, adequate anaesthesia cannot be certain.” *Id.*

<sup>80</sup> See, e.g., Michael Radelet, *Examples of Post-Furman Botched Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (last updated July 24, 2014).

<sup>81</sup> Cotterell, *supra* note 69.

<sup>82</sup> Lizzie Parry, *Murderer Who Raped and Killed a Woman in 1986 Finally Confesses Moments Before Being Executed*, DAILY MAIL (Oct. 18, 2013, 2:34 PM), <http://www.dailymail.co.uk/news/article-2465682/William-Happ-finally-confesses-Angie-Crowley-murder-moments-execution.html>. Under the traditional Baze-approved protocol, executions lasted approximately seven minutes. See *id.* According to a Florida Department of Corrections spokesperson, however, the drug used in Happ’s death caused no visible suffering or unusual reaction. Cotterell, *supra* note 69.

<sup>83</sup> Tim Talley, *Drugs, Not Heart Attack, Killed Clayton Lockett in Oklahoma Execution: Autopsy*, HUFFINGTON POST (Oct. 28, 2014, 5:59 AM), [http://www.huffingtonpost.com/2014/08/28/clayton-lockett-autopsy\\_n\\_5732298.html](http://www.huffingtonpost.com/2014/08/28/clayton-lockett-autopsy_n_5732298.html).

<sup>84</sup> *Id.* A witness remarked that Lockett thrashed and struggled against the restraints on the gurney, attempting to speak. She reports hearing him say “man” sixteen minutes into the execution, before the prison warden ordered blinds be shut on the execution chamber. Katie Fretland, *Clayton Lockett Writhed and Groaned. After 43 Minutes, He Was Declared Dead*, GUARDIAN (Apr. 30, 2014, 11:19 PM), <http://www.theguardian.com/world/2014/apr/30/clayton-lockett-oklahoma-execution-witness>.

<sup>85</sup> Fretland, *supra* note 84.

<sup>86</sup> *Id.*

<sup>87</sup> Talley, *supra* note 83. Lockett and another prisoner, Charles Warner, were scheduled to be executed together that night. Fretland, *supra* note 84. They sought information from the Oklahoma Department of Corrections about the drugs that would be used, arguing a right to

On January 16, 2014, Ohio executed Dennis McGuire using midazolam and hydromorphone, a combination never before used for an execution in the United States.<sup>88</sup> McGuire's execution took more than fifteen minutes, during which McGuire made several loud snorting noises and soundlessly opened and shut his mouth as if gasping.<sup>89</sup> Six months later, Arizona executed Joseph Wood using the same drug combination: midazolam and hydromorphone.<sup>90</sup> According to witnesses, Wood started gasping for air several minutes after the execution had begun, and continued gasping and pressing against his restraints for about an hour.<sup>91</sup> He finally died two hours later.<sup>92</sup>

On January 15, 2015, Oklahoma executed Charles Warner using a three-drug combination of midazolam, vecuronium bromide, and potassium chloride.<sup>93</sup> After the first drug, midazolam, was administered, Warner said, "My body is on fire."<sup>94</sup> Besides his statements—which also included "[i]t feels like acid" and "[n]o one should go through this"—Warner showed no obvious signs of suffering.<sup>95</sup> He died forty-three minutes after the execution

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that information on Eighth Amendment grounds. *See id.* Their claim was denied, and the execution initially proceeded as scheduled. *Id.* After the problems with Lockett's execution, however, Oklahoma postponed the scheduled execution of the other prisoner in order to investigate what had gone wrong with Lockett's execution. *Id.* In January 2015, Oklahoma executed Charles Warner. *See* Dana Ford, *Oklahoma Executes Charles Warner*, CNN (Jan. 16, 2015), <http://www.cnn.com/2015/01/15/us/oklahoma-execution-charles-frederick-warner/>. Warner's execution also raised concerns about whether he suffered as he died. *Id.*

<sup>88</sup> Andrew Welsh-Huggins, *Executed Killer Dennis McGuire Gasped and Snorted for 15 Minutes Under New Lethal Drug Combo*, HUFFINGTON POST (Jan. 16, 2014, 11:34 AM), [http://www.huffingtonpost.com/2014/01/16/dennis-mcguire-execution\\_n\\_4610582.html](http://www.huffingtonpost.com/2014/01/16/dennis-mcguire-execution_n_4610582.html).

<sup>89</sup> *Id.*

<sup>90</sup> Josh Sanburn, *Inside the Efforts to Halt Arizona's Two-Hour Execution of Joseph Wood*, TIME (July 24, 2014), <http://time.com/3026985/joseph-wood-arizona-lethal-injection-botched/>.

<sup>91</sup> *Id.* One writer reported that Wood gasped 640 times. *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Ford, *supra* note 87.

<sup>94</sup> Katie Fretland, *Oklahoma Carries Out First Execution Since Botched Lethal Injection in April*, GUARDIAN (Jan. 15, 2015), <http://www.theguardian.com/world/2015/jan/16/oklahoma-executes-charles-warner>. Just one year earlier, Oklahoma executed Michael Wilson, using the anesthetic pentobarbital. Charlotte Alter, *Oklahoma Convict Who Felt "Body Burning" Executed with Controversial Drug*, TIME (Jan. 10, 2014), <http://nation.time.com/2014/01/10/oklahoma-convict-who-felt-body-burning-executed-with-controversial-drug/>. Though Wilson showed no outward signs of distress, within seconds of the execution beginning, Wilson said, "I feel my whole body burning." "I Feel My Whole Body Burning," Says Oklahoma Death Row Inmate During Execution, FOX NEWS (Jan. 10, 2014), <http://www.foxnews.com/us/2014/01/10/feel-my-whole-body-burning-says-oklahoma-death-row-inmate-during-execution/>.

<sup>95</sup> Ford, *supra* note 87.



began.<sup>96</sup>

The recent botched executions have taken place against a backdrop of uncertainty about inaccessible drugs, new and often untested drug protocols, and questionable drug sources.<sup>97</sup> Problematic or prolonged executions may occur for a number of reasons, some of which implicate the drug supplier or execution protocol.<sup>98</sup> For instance, an execution can be botched if “the mixture or composition of the drugs is wrong due to mixing errors, precipitation (clumping into particles) or other reasons.”<sup>99</sup> Additionally, “one of the drugs used [in the United States], pancuronium bromide, could prevent the expression of pain experienced by a prisoner should the effect of thiopental be inadequate or wear off early.”<sup>100</sup>

In the 2015 term, the Supreme Court heard a case, *Glossip v. Gross*,<sup>101</sup> about another possible contributing factor to problematic executions: the use of midazolam.<sup>102</sup> Prior to his January 2015 execution, Warner, along with three other condemned Oklahoman prisoners, petitioned the Supreme Court to review the constitutionality of Oklahoma’s lethal injection protocol, which uses midazolam as the first of three drugs in the execution protocol.<sup>103</sup> Though the Court denied Warner a stay of execution pending the challenge,<sup>104</sup> Justice Sonia Sotomayor penned a dissent in which she articulated her concerns about Oklahoma’s use of midazolam in executions and “States’ increasing reliance on new and scientifically untested methods of execution.”<sup>105</sup> Following Warner’s problematic execution, the Supreme Court agreed to review Warner’s and his co-petitioners’ case.<sup>106</sup> In June

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<sup>96</sup> Fretland, *supra* note 94.

<sup>97</sup> Yet, even when it was conducted using tried and true methods, lethal injection went awry at significantly higher rates than any other method of execution. *See* SARAT ET AL., *supra* note 77; Siegelbaum, *supra* note 78; Palmer, *supra* note 78.

<sup>98</sup> *See* AMNESTY INTERNATIONAL, EXECUTION BY LETHAL INJECTION: A QUARTER CENTURY OF STATE POISONING 10 (2007).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> 135 S. Ct. 2726 (2015).

<sup>102</sup> Richard Wolf, *Supreme Court Will Review Use of Lethal Injections*, USA TODAY (Jan. 23, 2015, 8:42 PM), <http://www.usatoday.com/story/news/nation/2015/01/23/supreme-court-execution-drug/22212827/>.

<sup>103</sup> Sean Murphy, “*It Feels Like Acid.*” Charles Warner’s Final Words Raise Execution Questions, HUFFINGTON POST (Jan. 18, 2015), [http://www.huffingtonpost.com/2015/01/17/charles-warner-last-words\\_n\\_6492144.html](http://www.huffingtonpost.com/2015/01/17/charles-warner-last-words_n_6492144.html).

<sup>104</sup> *Id.*

<sup>105</sup> Warner v. Gross, 135 S. Ct. 824, 828 (2015) (Sotomayor, J., dissenting) (“I find the District Court’s conclusion that midazolam will in fact work as intended difficult to accept given recent experience with the use of this drug.”).

<sup>106</sup> Wolf, *supra* note 102.

2015, the Supreme Court decided, in a 5–4 decision, that the petitioners failed to establish a likelihood of success on their claim that the use of midazolam in lethal injection protocols violates the Eighth Amendment.<sup>107</sup>

As Justice Stephen Breyer addressed at length in his dissent in *Glossip*, the multitude of recent botched executions involving new drug protocols and questionable drug sources raises significant questions about whether current means of administering lethal injection violate the Eighth Amendment’s prohibition on cruel and unusual punishment.<sup>108</sup> In order to evaluate the constitutionality of lethal injection, courts, prisoners, and the public need access to information about the drugs, drug sources, and drug protocols used in state-sponsored executions, so as to examine and address what has been causing problems in recent executions. This Comment argues that the First Amendment creates a right of access to this information.

## II. STATE SECRECY STATUTES

### A. STATUTES REGARDING CONFIDENTIALITY OF EXECUTION DRUG SUPPLIERS

For years, starting with the advent of executions by lethal injection, states developed and published protocols detailing the drugs to be used in the executions.<sup>109</sup> In recent years, however, many states that authorize capital punishment have enacted statutes that shield information about executions from public disclosure.<sup>110</sup> Other states have recently considered or are in the process of considering proposals to adopt secrecy laws.<sup>111</sup> As described *supra* in the Introduction, the Louisiana legislature considered a proposed secrecy statute in 2014.<sup>112</sup> The legislation had widespread support, but was ultimately withdrawn by Senator Lopinto in the aftermath of a

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<sup>107</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2736 (2015).

<sup>108</sup> *Id.* at 2755–80.

<sup>109</sup> See *supra* Part I.A. and I.B. and *infra* notes 220–222 & accompanying text.

<sup>110</sup> See *infra* Appendix.

<sup>111</sup> See House Bill 1305, *Mississippi Legislature 2015 Regular Session*, <http://billstatus.ls.state.ms.us/2015/pdf/history/HB/HB1305.xml> (died in committee); H.R. 663, 130th Gen. Assemb., (Ohio 2014) (taking effect Mar. 20, 2015); Mike Cason, *Bills that Passed and Died During the Alabama Legislature’s 2014 Session*, AL.COM (Apr. 6, 2014, 12:00 PM), [http://blog.al.com/wire/2014/04/bills\\_that\\_passed\\_and\\_died\\_dur.html](http://blog.al.com/wire/2014/04/bills_that_passed_and_died_dur.html); Julie Deisher-Edwards, *Death Row Inmates Challenge Ohio Execution Secrecy Law*, JURIST (Dec. 25, 2014, 6:56 PM), <http://jurist.org/paperchase/2014/12/death-row-inmates-challenge-ohio-execution-secrecy-law.php>; Pilkington, *supra* note 11. The reasons for proposing and enacting these statutes are described *infra* Part II.B., but largely relate to states’ concerns about preserving their ability to find drug suppliers. See Amy, *supra* note 64.

<sup>112</sup> Pilkington, *supra* note 11.

botched execution in Oklahoma.<sup>113</sup> In 2014, Alabama considered enacting a secrecy statute but ultimately declined,<sup>114</sup> as did Mississippi in 2015.<sup>115</sup> In December 2014, Ohio successfully enacted a bill<sup>116</sup> guaranteeing confidentiality for those involved in the manufacturing of drugs for use in capital punishment.<sup>117</sup> In September 2015, a Texas secrecy statute went to effect excepting information about people or entities that manufacture or compound execution drugs from public disclosure.<sup>118</sup> These legislative efforts are the latest in what appears to be an ongoing shift to greater secrecy surrounding state executions.<sup>119</sup>

Existing secrecy statutes vary in terms of how they protect information and how tightly information is controlled. Some states use general state disclosure acts to shield execution-related information.<sup>120</sup> Other states have enacted special statutes that make information about execution team members' identities undiscoverable.<sup>121</sup> Georgia considers information about the execution team to be a closely protected state secret that even judges cannot review.<sup>122</sup> In South Dakota, disclosure of protected information about the execution team is a crime.<sup>123</sup>

The statutes also vary in terms of how they characterize what information is nondisclosable. For example, statutes range from leaving the definition of "execution team" up to the state department of corrections, as Missouri has done, to explicitly including protections for the "entities" responsible for manufacturing and supplying the drugs.<sup>124</sup> A table in the Appendix to this Comment details the language of existing statutes on execution drug supplier confidentiality laws in a number of states.<sup>125</sup>

In addition to states' growing secrecy about execution teams and drug

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<sup>113</sup> *Id.*

<sup>114</sup> Cason, *supra* note 111.

<sup>115</sup> Miss. H.R. 1305.

<sup>116</sup> *See* Ohio H.R. 663.

<sup>117</sup> Deisher-Edwards, *supra* note e111.

<sup>118</sup> V.T.C.A. § 552.1081.

<sup>119</sup> Denno II, *supra* note 36, at 1379; Denno III, *supra* note 71, at 95–96.

<sup>120</sup> VIRGINIA E. SLOAN ET AL., AMERICAN BAR ASS'N, DEATH PENALTY DUE PROCESS REVIEW PROJECT: REPORT TO THE HOUSE OF DELEGATES 1, 4 (2015) (noting Tennessee as an example); *see also* V.T.C.A. § 552.1081 (Texas).

<sup>121</sup> *Id.* at 3–4 (noting Arizona, Florida, Georgia, Missouri, and Oklahoma as examples); *see also infra* Appendix.

<sup>122</sup> GA. CODE ANN. § 42-5-36(d) (Lexis, LexisAdvance through 2015 Regular Session).

<sup>123</sup> S.D. CODIFIED LAWS § 23A-27A-31.2 (West, Westlaw through the 2015 Regular Session, Exec. Order 15-1, and Supreme Court Rule 15-16).

<sup>124</sup> *See infra* Appendix.

<sup>125</sup> *See infra* Appendix.

suppliers, states have become increasingly secretive about the specifics of their execution protocols. In 2001 and 2005, legal scholar Deborah Denno conducted two nationwide studies of lethal injection protocols.<sup>126</sup> In analyzing the differences between the two studies, Denno found that the number of states willing to release full execution protocols in 2005 had fallen to less than one-third of the numbers in 2001—from nineteen states to six states.<sup>127</sup> Additionally, “the number of states claiming confidentiality [about their protocols] increased nearly fourfold . . . .”<sup>128</sup> Denno found that many states failed to provide critical information about the concentrations of the drugs used, a factor that has a strong effect on whether the condemned prisoner experiences pain during his execution.<sup>129</sup> In 2005, half of the states authorizing use of the death penalty did not allow any evaluation of their execution protocols.<sup>130</sup> Moreover, several states have responded to botched executions by insisting that the state DOC that administered the execution conduct the sole investigative review of the botched execution.<sup>131</sup>

In response to the ever-increasing secrecy shrouding information about states’ use of lethal injection, the American Bar Association adopted a resolution in February 2015 urging all jurisdictions that impose capital punishment to publish their execution drug protocols “in an open and transparent manner,” require public review and comment on proposed protocols, and require disclosure of “all relevant information regarding execution procedures.”<sup>132</sup>

States have variously insulated drug protocols, drug suppliers, and the individuals responsible for making execution drugs and carrying out executions from public disclosure. This secrecy, particularly secrecy that prevents verification of the drugs’ safety and efficacy, harms condemned

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<sup>126</sup> Denno II, *supra* note 36, at 1379.

<sup>127</sup> *Id.*; Denno III, *supra* note 71, at 95.

<sup>128</sup> Denno III, *supra* note 71, at 96.

<sup>129</sup> *See id.* at 99.

<sup>130</sup> *Id.* at 96.

<sup>131</sup> *See* SLOAN ET AL., *supra* note 120, at 8 (“After the January botched execution of Dennis McGuire in Ohio, the Department of Rehabilitation and Corrections conducted an internal review and released an Executive Summary on April 28, 2014. The summary explains that the department interviewed nearly twenty witnesses and consulted with the same medical expert who had testified for the state prior to the botched execution. The summary ultimately concluded that ‘[t]here is no evidence that McGuire experienced any pain, distress or anxiety’ during the execution. The Ohio Department of Corrections and Rehabilitation did not release any transcripts from the interviews that were conducted, did not provide any primary documents, and no autopsy was performed after the execution.”).

<sup>132</sup> ABA House of Delegates, Resolution 108B (adopted Feb. 9, 2015).

prisoners and the public.

#### B. REASONS STATES HAVE IMPLEMENTED SECRECY STATUTES

Lawmakers enacting secrecy statutes argue that secrecy is necessary to protect medical professionals from professional censure and personal harassment due to their involvement in state-sponsored executions.<sup>133</sup> The ABA rejects these justifications.<sup>134</sup> With respect to claims that medical professionals might face threats to their personal safety, the ABA notes that no credible threats to drug manufacturers' personal safety have ever been verified.<sup>135</sup> Moreover, personal safety risks could be ameliorated by "narrowly-tailored remedies [crafted by the courts] that protect names and identifying information from entering the public record while still allowing prisoners to bring meaningful challenges to execution protocols."<sup>136</sup>

As for states' concerns about making suppliers the targets of public criticism, the ABA notes that such risks are "part and parcel of the American economic system. It is difficult to imagine other scenarios in which a business's concerns about the public's response to their activities would lead U.S. elected officials to conceal that business's identity from the public."<sup>137</sup> Admittedly, this is the unusual circumstance in which states rely upon private businesses to aid the state in carrying out government business, and thus, states have a greater interest in protecting the companies with which they do business. States also may be justified in their concerns that some businesses will decline to supply execution drugs.<sup>138</sup> But risk of some added difficulty in obtaining execution drugs should not outbalance the public's interest in ensuring that states' methods of execution comport with society's "evolving standards of decency." Nor does the risk of added difficulty in finding suppliers explain why the identity of sources is, in some states, protected even from prisoners facing execution and the judges overseeing their cases.<sup>139</sup> And the risk that some businesses might choose not to supply prisons with execution drugs does not justify turning those businesses into unwilling participants in executions, like the hospital described *supra* in the Introduction.<sup>140</sup>

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<sup>133</sup> SLOAN ET AL., *supra* note 120, at 12.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., *In re Lombardi*, 741 F.3d 888, 894 (8th Cir. 2014) (discussing in dicta evidence provided by the state about the difficulty of obtaining drugs).

<sup>139</sup> See, e.g., GA. CODE ANN. § 42-5-36(d) (West 2013).

<sup>140</sup> See *supra* Introduction.

In addition to states' proffered justifications for secrecy statutes, there may be a third reason for the secrecy: concealment of the risks associated with lethal injection.<sup>141</sup> Secrecy measures may enable states to hide questionable sources and obscure risks associated with certain sources and protocols. As discussed *supra*, lethal injection sources—now typically compounding pharmacies—face little, if any, regulation.<sup>142</sup> Making those sources secret further ensures that prisoners, courts, and the public cannot investigate those sources to ensure that their drugs are uncontaminated, are compounded by qualified personnel, or are produced in the appropriate concentration and dosage. Lethal injection protocols are increasingly varied, and recently, several states have resorted to using new, untested protocols in executions.<sup>143</sup> Secrecy about the protocols prevents research into the dangerousness (in terms of causing pain) or efficacy of new protocols.

Some of the information protected by states' new or amended secrecy statutes could be critically important to analyses about whether the drugs used in any given execution conform to the Eighth Amendment's prohibition on "cruel and unusual punishment."<sup>144</sup> As discussed *supra* in Part I.C., several prisoners recently experienced pain as a result of the drugs or drug combinations used to effectuate their deaths.<sup>145</sup> Condemned prisoners seeking to prove, prospectively, that their own executions will include a "substantial risk of serious harm" that is "objectively intolerable"<sup>146</sup> need access to the information being protected by state secrecy statutes.<sup>147</sup> Courts too need access to information about the drug protocol and drug source to be used in an execution in order to evaluate whether the execution can be conducted humanely and constitutionally.<sup>148</sup>

In the past decade, states have become increasingly secretive about their execution protocols and the sources of the drugs they use in lethal injections.<sup>149</sup> Such secrecy thwarts efforts to evaluate the continued use of lethal injection as a means of effectuating capital punishment, and it improperly checks the judicial system's ability to determine whether lethal

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<sup>141</sup> Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 880 (9th Cir. 2002).

<sup>142</sup> See Denno II, *supra* note 36, at 1368.

<sup>143</sup> See, e.g., *Lacking Lethal Injection Drugs, States Find Untested Backups*, NPR (Oct. 26, 2013, 7:32 PM), <http://www.npr.org/2013/10/26/241011316/lacking-lethal-injection-drugs-states-find-untested-backups>.

<sup>144</sup> U.S. CONST. amend. VIII; SLOAN ET AL., *supra* note 120, at 9.

<sup>145</sup> See *supra* Part I.C.

<sup>146</sup> *Baze v. Rees*, 553 U.S. 35, 50 (2008).

<sup>147</sup> SLOAN ET AL., *supra* note 120, at 9 ("Under many of today's active and proposed secrecy laws, such an analysis would not be possible.").

<sup>148</sup> *Id.* at 10.

<sup>149</sup> See *infra* Appendix.

injection under certain circumstances may violate the Eighth Amendment.

### III. THE PRESUMPTIVE RIGHT OF ACCESS TO INFORMATION

President Lyndon B. Johnson, in a statement made upon signing the Freedom of Information Act into law, noted:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.<sup>150</sup>

The value of freedom of information in American democracy traces back to the Founding Fathers.<sup>151</sup>

While the First Amendment does not explicitly address a right of access to information,<sup>152</sup> it does guarantee the right to free speech.<sup>153</sup> As First Amendment jurisprudence has evolved, the Court has recognized that the right to free speech comes with the corollary rights to receive and disseminate information.<sup>154</sup> The Court has also determined that the public

<sup>150</sup> Press Release, Office of the White House Press Secretary, Statement by the President Upon Signing S. 1160 (July 4th, 1966), <http://www2.gwu.edu/~nsarchiv/nsa/foia/FOIARelease66.pdf>.

<sup>151</sup> As James Madison, author of the First Amendment, famously expressed, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." *Letter from James Madison to W.T. Barry, Aug. 4, 1822*, in 1 THE FOUNDERS' CONSTITUTION, Ch. 18, Document 35 (Philip B. Kurland & Ralph Lerner eds., 1987), <http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html>.

<sup>152</sup> Indeed, the Supreme Court has held there is "no constitutional right to have access to particular government information, or to require openness from the bureaucracy." *Houchins v. KQED*, 438 U.S. 1, 14 (1978) (plurality opinion) (quoting Justice Potter Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631, 636 (1975)). Instead, the Legislative Branch has the power to determine, as it did with the Freedom of Information Act, what governmentally held information should be made public. *Id.* at 14–15. However, the Court has found in certain instances a right of access beyond what has been legislatively determined. *See, e.g.*, *Press-Enter. Co. v. Super. Ct. (Press-Enter. II)*, 478 U.S. 1, 10 (1986) (right of access to voir dire); *Press-Enter. Co. v. Super. Ct. (Press-Enter. I)*, 464 U.S. 501, 511 (1984) (right of access to preliminary hearings); *Globe Newspaper v. Super. Ct.*, 457 U.S. 596, 604–06 (1982) (right of access to trials); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion) (same); *see also* *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002) (right of access to executions).

<sup>153</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

<sup>154</sup> *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (holding that the right to receive information was "necessarily correlative" to the rights guaranteed by the First Amendment); *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (noting the right to receive and distribute literature); *see* *New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J.,

has a qualified right of access to certain kinds of information from the government, so as to allow informed public debate.<sup>155</sup> This right of access, though not enumerated in the First Amendment, is “nonetheless necessary to the enjoyment of other First Amendment rights.”<sup>156</sup> For instance, judicial proceedings, including all phases of criminal trials, must be open to the public and the press.<sup>157</sup> While a more deferential standard of review applies to prison operations and proceedings than does to regular government proceedings, courts have also recognized that the public has a qualified right of access to information about some prison operations.<sup>158</sup> That right extends to viewing executions and “those ‘initial procedures’ that are inextricably intertwined with the process” of executing a condemned prisoner.<sup>159</sup>

This section will explore the evolving bounds of the presumptive right of access in the context of government proceedings and government documents generally, and with respect to prisons and state-sponsored executions specifically. The First Amendment grants a meaningful right of access that enables the public and the press to know what happens in government proceedings, government institutions such as prisons, and government-sponsored penalty proceedings within prisons—namely, executions.

#### A. RIGHT OF ACCESS TO GOVERNMENT PROCEEDINGS

According to the Supreme Court, the public has a presumptive right of

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concurring) (“Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be ‘uninhibited, robust, and wide-open’ debate.”). See generally Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175 (describing the evolution of the right of access, primarily as it applies in the context of libraries).

<sup>155</sup> *Cal. First Amendment Coal.*, 299 F.3d at 873–74 (“It is well-settled that the First Amendment guarantees the public—and the press—a qualified right of access to governmental proceedings. This right of access is premised on the common understanding that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. By guaranteeing that the individual citizen can effectively participate in and contribute to our republican system of self-government, the First Amendment right of access ensures that this constitutionally protected discussion of governmental affairs is an informed one.” (citations and internal quotation marks omitted)).

<sup>156</sup> *Id.* at 874 (quoting *Globe Newspaper*, 457 U.S. at 604).

<sup>157</sup> See, e.g., *Press-Enter. II*, 478 U.S. 1, 10 (1986); *Press-Enter. I*, 464 U.S. 501, 507 (1984). For the purpose of this Comment, “press” refers to those people or entities engaged in gathering and publishing or broadcasting news.

<sup>158</sup> See *Pell v. Procunier*, 417 U.S. 817, 831 n.7 (1974); *Cal. First Amendment Coal.*, 299 F.3d at 874.

<sup>159</sup> *Cal. First Amendment Coal.*, 299 F.3d at 877.



access to judicial proceedings, particularly in criminal cases.<sup>160</sup> In 1980 in *Richmond Newspapers v. Virginia*, the Supreme Court explored, for the first time, the issue of whether the public has a right of access to criminal trials.<sup>161</sup> In its analysis, the Court provided a lengthy historical account of the public nature of trials.<sup>162</sup> The Court also considered the value of providing public access to government institutions: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."<sup>163</sup> Additionally, public access increases respect for the law and confidence in judicial remedies.<sup>164</sup> The right of access, the Court held, inheres in the First Amendment because that amendment, beyond its role of protecting the press and the self-expression of individuals, also "prohibit[s] government from limiting the stock of information from which members of the public may draw."<sup>165</sup> Because of this value, the Court determined that criminal trials must be open to the public, absent an overriding interest to the contrary.<sup>166</sup>

In 1982, two years after deciding *Richmond Newspapers*, the Court affirmed its holding in *Globe Newspaper v. Superior Court* after another district court barred the public and press from a trial.<sup>167</sup> The state noted that the right of access created in *Richmond Newspapers* was qualified, subject to limitation in the face of an overriding interest in closure.<sup>168</sup> Arguing that the limitation applied, the state asserted an interest in protecting the physical and psychological well-being of minor rape victims testifying at the trial.<sup>169</sup> The state also argued that closure served the interest of encouraging other child victims of sex crimes to come forward to law enforcement and provide testimony.<sup>170</sup> The Court was not swayed by these considerations, and held that the press's right of access to criminal trials outweighed the state's proffered interests in barring the public and the

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<sup>160</sup> See *Press-Enter. II*, 478 U.S. at 9–10 (1986); *Press-Enter. I*, 464 U.S. at 508 (1984); *Globe Newspaper*, 457 U.S. at 604–05; *Richmond Newspapers v. Virginia*, 448 U.S. 555, 567 (1980).

<sup>161</sup> 448 U.S. at 564, 576–77.

<sup>162</sup> *Id.* at 564–75.

<sup>163</sup> *Id.* at 572.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 575–76 (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)).

<sup>166</sup> *Id.* at 580–81.

<sup>167</sup> 457 U.S. 596, 606–07 (1982).

<sup>168</sup> *Id.* at 607–08.

<sup>169</sup> *Id.* at 607.

<sup>170</sup> *Id.*

press.<sup>171</sup>

Following *Richmond Newspapers* and *Globe Newspaper*, the Court found a right of access to voir dire in *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*,<sup>172</sup> and to preliminary hearings in *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*.<sup>173</sup>

*Press-Enterprise II* set out the “complementary considerations” test for finding a right of access, namely: (1) the existence of a tradition of accessibility (the “experience” prong), and (2) whether access plays a “significant positive role in the functioning of the process in question” (the “logic” prong).<sup>174</sup> A qualified right of access attaches to a particular proceeding if it passes the complementary tests of logic and experience.<sup>175</sup> The right can be limited only when a court finds proof of an overriding interest in closure in a particular case.<sup>176</sup>

Functionally, the right of access to government proceedings is a meaningful right that incorporates the right to know what is happening or being discussed at that government proceeding. As this Comment argues in Part IV, meaningful access to executions includes access to information about or first-hand knowledge of what is happening during various aspects of the proceedings, including seeing the installation of intravenous lines, knowing what drugs are injected into the condemned prisoner’s body, and witnessing the condemned prisoner’s final words and physical responses to the execution.

## B. RIGHT OF ACCESS TO JUDICIAL DOCUMENTS

Since recognizing a right of access to court proceedings, courts have also found a right of access to documents related to those proceedings. The Second Circuit,<sup>177</sup> Fourth Circuit,<sup>178</sup> Ninth Circuit,<sup>179</sup> and D.C. Circuit<sup>180</sup>

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<sup>171</sup> *Id.* at 610.

<sup>172</sup> *Press-Enter. I*, 464 U.S. 501, 511 (1984) (“Absent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire.”).

<sup>173</sup> *Press-Enter. II*, 478 U.S. 1, 10 (1986).

<sup>174</sup> *Id.* at 8–9.

<sup>175</sup> *Id.* at 9.

<sup>176</sup> *Id.* at 9–10 (quoting *Press-Enter. I*, 464 U.S. at 510) (“[T]he presumption [of openness] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.”).

<sup>177</sup> *U.S. v. Haller*, 837 F.2d 84, 86 (2nd Cir. 1988).

<sup>178</sup> *In re Wash. Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986).

<sup>179</sup> *Oregonian Publ’g Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1465 (9th Cir. 1990) (“Under the first amendment [sic], the press and the public have a presumed right of access to court

have each recognized a right of access to “plea agreements” and “related documents.” Courts have also recognized a right of access to documents filed in connection with pretrial motions,<sup>181</sup> pretrial release proceedings and related documents,<sup>182</sup> post-trial documents,<sup>183</sup> transcripts of closed post-trial proceedings,<sup>184</sup> and “public records and proceedings” in civil cases.<sup>185</sup> The right of access to documents related to judicial proceedings, combined with the right of access to attend government proceedings, expands the purview of the right of access by allowing the public and the press access to information beyond what they can access by attending proceedings.

### C. RIGHT OF ACCESS WITHIN PRISONS

Federal courts generally take a “hands-off attitude towards problems of prison administration,” according great deference to the judgment and expertise of the legislative and executive branches of government.<sup>186</sup> However, courts do recognize a limited right of access to penal institutions by the public and the press.<sup>187</sup> After all, “the conditions in this Nation’s prisons are a matter that is both newsworthy and of great public importance.”<sup>188</sup>

While safety considerations necessitate that prisons not be made public, the right of access is so important that “members of the press are accorded substantial”—albeit not unfettered—“access to the federal prisons in order to observe and report the conditions they find there.”<sup>189</sup> The Court thus recognizes the role that members of the press play in ensuring the public has an opportunity to understand what happens within prison walls.<sup>190</sup> Accordingly, “the Supreme Court has never flatly held that the

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proceedings and documents.”).

<sup>180</sup> *Wash. Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991).

<sup>181</sup> *In re New York Times Co.*, 828 F.2d 110, 114 (2nd Cir. 1987).

<sup>182</sup> *Seattle Times Co. v. U.S. Dist. Ct.*, 845 F.2d 1513, 1517 (9th Cir. 1988).

<sup>183</sup> *CBS, Inc. v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985).

<sup>184</sup> *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 949 (9th Cir. 1998).

<sup>185</sup> *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014); *Virginia Dep’t of State Police v. Wash. Post*, 386 F.3d 567 (2004).

<sup>186</sup> *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1984), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989).

<sup>187</sup> *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 847–48 (1974).

<sup>188</sup> *Pell v. Procunier*, 417 U.S. 817, 830 n.7 (1974).

<sup>189</sup> *Saxbe*, 417 U.S. at 847. Courts have similarly determined that the press and the public must have ample opportunities to observe state prison conditions. *Pell*, 417 U.S. at 830.

<sup>190</sup> *See Saxbe*, 417 U.S. at 847; *see also Richmond Newspapers*, 448 U.S. at 572–73 (noting that people now acquire information about criminal trials through print and electronic media rather than by firsthand observation or by word of mouth).

press has no First Amendment right to view events inside prison walls; only that such a right is co-extensive with the public's right to the same information."<sup>191</sup> Courts clearly recognize that though prisons are not public places, the public has a strong interest in understanding what takes place within them.<sup>192</sup>

#### D. RIGHT OF ACCESS TO EXECUTIONS

Though the First Amendment right of access is limited in prison, courts have ensured access to information related to state-sponsored executions.<sup>193</sup> The Ninth Circuit and the Middle District of Pennsylvania both held that the First Amendment right of access to executions extends to viewing all phases of an execution, rather than merely the period of time during which lethal drugs are injected into the condemned prisoner's body.<sup>194</sup>

Both courts reached their conclusions through an application of the *Press-Enterprise II* logic and experience test.<sup>195</sup> The courts recognized a long historical tradition of allowing the public to witness state-sponsored executions, from public executions in England dating back at least to 1196 to American executions within prisons, at which official witnesses must be present.<sup>196</sup> Moreover, throughout English and American history, witnesses have been permitted to view executions in their entirety.<sup>197</sup>

These courts also found that public access to the entirety of an execution serves "a significant role in the proper functioning of capital punishment."<sup>198</sup> First, the courts reasoned that public access enables

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<sup>191</sup> Cal. First Amendment Coal. v. Calderon, 150 F.3d 976, 982 (9th Cir. 1998).

<sup>192</sup> See *Pell*, 417 U.S. at 830–31; *Saxbe*, 417 U.S. at 847.

<sup>193</sup> See Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 875 (9th Cir. 2002); *Phila. Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 373 (M.D. Pa. 2012).

<sup>194</sup> See Cal. First Amendment Coal., 299 F.3d at 877; *Phila. Inquirer*, 906 F. Supp. 2d at 371.

<sup>195</sup> Cal. First Amendment Coal., 299 F.3d at 875–77; *Phila. Inquirer*, 906 F. Supp. 2d at 370–71.

<sup>196</sup> Cal. First Amendment Coal., 299 F.3d at 875–76; see *Phila. Inquirer*, 906 F. Supp. 2d at 370–71 (finding the historical tradition existed in Pennsylvania).

<sup>197</sup> Cal. First Amendment Coal., 299 F.3d at 875–76; see *Phila. Inquirer*, 906 F. Supp. 2d at 370–71 (finding witnesses were historically permitted in Pennsylvania).

<sup>198</sup> Cal. First Amendment Coal., 299 F.3d at 876; accord *Phila. Inquirer*, 906 F. Supp. 2d at 371 ("[F]ull access to Pennsylvania's process and experience will allow for a more thorough evaluation of how the Commonwealth's procedures comport with evolving constitutional standards."). In *Philadelphia Inquirer*, the Court further notes that the portions of the execution closed to public view were exactly the portions at issue in *Baze*, so closure prevented the public and the press from determining whether Pennsylvania's administration of the death penalty complied with the parameters set out in *Baze*. 906 F. Supp. 2d at 371.

informed public debate about whether lethal injection “comports with” society’s “evolving standards of decency.”<sup>199</sup>

Second, public scrutiny “enhances the quality and safeguards the integrity of the factfinding process” by allowing the public to determine whether lethal injection executions are “fairly and humanely administered.”<sup>200</sup> Unless witnesses are granted the opportunity to observe all aspects of the execution, the prison leaves witnesses with no first-hand knowledge of whether guards use force to restrain the prisoner, whether the execution team experiences complications in trying to establish an intravenous line, and whether the prisoner experiences pain.<sup>201</sup> Prison officials’ reports on the execution process and the process’s potential shortcomings “may be vastly different—and markedly less critical—” than reports of media eyewitnesses.<sup>202</sup>

Third, public access “fosters an appearance of fairness” and transparency which “heighten[s] [] respect for the judicial process.”<sup>203</sup> Finally, public observation of executions allows the public to witness justice being done, which provides the community with a “sense of catharsis” and provides “crucial prophylactic” effects.<sup>204</sup>

The Ninth Circuit and the Middle District of Pennsylvania both determined that the public has a qualified right of access to view the entirety of executions.<sup>205</sup>

In *California First Amendment Coalition*, the Ninth Circuit recognized that when a right of access attaches to a governmental proceeding, then any limitation on that right should be evaluated under strict scrutiny, the most stringent level of judicial review.<sup>206</sup> However, executions are atypical

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<sup>199</sup> *Cal. First Amendment Coal.*, 299 F.3d at 876 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); accord *Phila. Inquirer*, 906 F. Supp. 2d at 371.

<sup>200</sup> *Cal. First Amendment Coal.*, 299 F.3d at 876 (quoting *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 501, 606 (1984)); accord *Phila. Inquirer*, 906 F. Supp. 2d at 371.

<sup>201</sup> *Cal. First Amendment Coal.*, 299 F.3d at 883–84; accord *Phila. Inquirer*, 906 F. Supp. 2d at 371.

<sup>202</sup> *Cal. First Amendment Coal.*, 299 F.3d. at 884.

<sup>203</sup> *Id.* at 876 (quoting *Globe Newspaper*, 457 U.S. at 606); accord *Phila. Inquirer*, 906 F. Supp. 2d at 371.

<sup>204</sup> *Cal. First Amendment Coal.*, 299 F.3d at 877 (quoting *Richmond Newspapers v. Va.*, 448 U.S. 555, 572 (1980)); *Phila. Inquirer*, 906 F. Supp. 2d at 371 (“Allowing the press to view the entire execution also provides significant community therapeutic value.”).

<sup>205</sup> *Cal. First Amendment Coal.*, 299 F.3d at 877; *Phila. Inquirer*, 906 F. Supp. 2d at 372.

<sup>206</sup> The Ninth Circuit does not use the term “strict scrutiny,” but the test it lays out for right of access cases uses the language of the strict scrutiny test; “once the right of access attaches to a governmental proceedings, that right may be overcome only by an *overriding interest* based on findings that closure is essential to preserve higher values and is *narrowly tailored* to serve that interest.” *Cal. First Amendment Coal.*, 299 F.3d at 877 (internal quotes

governmental proceedings in that they generally take place within prisons,<sup>207</sup> and regulations within prisons are typically evaluated under a different standard; challenges to prison regulations that burden fundamental rights must be evaluated based on whether the regulation “is ‘reasonably related’ to legitimate penological objectives, or whether it represents an ‘exaggerated response’ to those concerns.”<sup>208</sup> Yet even when applying the more deferential judicial review standard accorded to prison regulations as opposed to state legislation, the Ninth Circuit affirmed the district court’s decision to permanently enjoin the prison from restricting viewing access to executions.<sup>209</sup> The Middle District of Pennsylvania similarly granted a

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omitted, emphasis added); see 16B Am. Jur. 2d C.J.S. *Constitutional Law* § 862, Westlaw (database updated Feb. 2016) (to pass strict scrutiny, a law burdening a constitutionally protected right must be justified by a “compelling interest” and be “narrowly tailored” to achieve that interest); see also *Phila. Inquirer*, 906 F. Supp. 2d at 372 (evaluating whether regulations obstructing access to certain phases of the execution process was “necessitated by a compelling governmental interest” and was “narrowly tailored to serve that interest”).

<sup>207</sup> But see *Phila. Inquirer*, 906 F. Supp. 2d at 369 (noting that the execution complex at the facility in question was moved outside the prison’s perimeter).

<sup>208</sup> *Cal. First Amendment Coal.*, 299 F.3d at 878 (quoting *Turner v. Safley*, 482 U.S. 78, 87 (1987)). Four relevant factors determine whether a restriction on rights within a prison is reasonable or an exaggerated response:

(1) [W]hether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it, (2) whether the inmate has alternative means of exercising the right that remain open to prison inmates; (3) what impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally and (4) whether there exist ready alternatives . . . that would fully accommodate[] the prisoner’s rights at *de minimis* cost to valid penological interests.

*Id.* (quoting *Turner*, 482 U.S. at 89–91).

<sup>209</sup> *Cal. First Amendment*, 299 F.3d at 885–86. In *California First Amendment Coalition*, the Ninth Circuit applied the four-pronged test developed in 1987 in *Turner v. Safley* to the prison regulation. 299 F.3d at 878 (citing *Turner*, 482 U.S. at 89–91). In evaluating the first prong, the court held that the California Department of Corrections (DOC) failed to demonstrate a valid connection between the regulation that hid portions of the execution and the interest put forth to justify it—the DOC’s apparent fear that members of the execution team might be publicly identified and retaliated against. *Id.* at 881–83. The court permitted prison officials to make regulations in anticipation of security concerns, but demanded that prison officials provide evidence that their concerns were “real, not imagined.” *Id.* at 882. The DOC’s proffered justification, in contrast, was deemed “speculative and contradicted by history.” *Id.*

Though the Ninth Circuit acknowledged that the first prong is arguably dispositive, it proceeded to evaluate the other three prongs as well. *Id.* at 883. The second prong addresses whether “alternative means of exercising the right” exist. *Id.* The court considered the lack of alternative means to gain information “particularly relevant because of our conclusion that it is critical for the public to be reliably informed about the lethal injection method of execution.” *Id.* at 884. As for the third factor, the court ruled that accommodation of the right to view the entire execution procedure has a minimal impact on guards, inmates, and prison resources. *Id.* Finally, in regards to the last factor, accommodating the right can be easily

preliminary injunction against a DOC regulation that restricted viewing access to executions.<sup>210</sup>

As this section has shown, the right of access includes a right to attendance and a right to documentation about government proceedings. The right of access exists even within prisons and even with respect to executions. The next section argues that a right of access to information about lethal injection drug protocols and sources necessarily follows from existing case law granting the right of viewing access to executions and case law granting a right of access to information about government proceedings. Access to information about drug protocols and sources would make the right to attend executions meaningful, because it would enable execution attendees to know precisely what is happening at an execution.

#### IV. THE FIRST AMENDMENT CHALLENGE TO SECRECY STATUTES

Secrecy statutes about executions have been attacked on several constitutional grounds.<sup>211</sup> This Comment analyzes the public's (including prisoners' and the press's) First Amendment right to know information critical to understanding the method by which executions will be conducted. Section A of this part applies the test for the First Amendment right of access to execution-related information, arguing that the right of access extends to information about execution protocols and drug sources. Section B examines recent court decisions and pending cases in which plaintiffs have advanced First Amendment right of access arguments.

##### A. THE RIGHT OF ACCESS EXTENDS TO INFORMATION RELATED TO CONDUCTING EXECUTIONS

The public has a qualified right of access to information about

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accomplished at minimal cost, as allowing execution team members to wear surgical masks can easily solve security concerns about revealing their identities. *Id.* at 884–85. Thus, the regulation limiting the right of access did not withstand the court's scrutiny. *Id.* at 885–86.

<sup>210</sup> *Phila. Inquirer*, 906 F. Supp. 2d at 363, 365.

<sup>211</sup> See, e.g., *Hill v. Owens*, 2013-CV-233771, Order, 5 (July 18, 2013) (challenging secrecy statute on Due Process and Eighth Amendment grounds; “By making information about the source of the drugs to be used for Plaintiff’s execution, as well as professional qualifications of those involved in its manufacture or compound inaccessible to Plaintiff, O.C.G.A. § 42-5-36(d) makes it impossible for Plaintiff to craft a meaningful Eighth Amendment claim, and thus forecloses his right to raise his constitutionally afforded claims and be heard.”); see also Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 B.U. L. REV. 427, 453 (2015) (“[P]etitioners raising due process claims in execution secrecy cases argue that not knowing the method of execution or the source of execution drugs poses a substantial risk of suffering in violation of the Eighth Amendment.”).

executions under the First Amendment. That right extends from recognized rights to attendance at government proceedings, including executions, and right of access to documents related to those proceedings.<sup>212</sup> Moreover, a tradition of access to information about executions supports this right of access, as does the significant positive role that such access would play in public discourse about the use of lethal injection. State secrecy laws that shield information about execution drug sources and drug protocols impermissibly burden the public's First Amendment right of access.

### *1. A Qualified Right of Access Exists*

To establish a right of access to information about drug protocols and sources, one must prove both a tradition of access to that kind of execution information, and that access would serve a significant positive role in the functioning of executions.<sup>213</sup> For the reasons explained below, execution-related information satisfies both prongs of this test.

#### *a. The Tradition of Access to Execution Information*

The tradition of public access to executions includes a tradition of access to information about the method of execution. As described *supra* in Part I.A., executions have been public events for centuries.<sup>214</sup> As such, the public has long been able to see the method of execution.<sup>215</sup> Even once executions became private, occurring within the walls of a prison, members of the press and public served as witnesses to executions.<sup>216</sup>

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<sup>212</sup> See *supra* Part III.

<sup>213</sup> See *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 875–77 (9th Cir. 2002); *Phila. Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 370–71 (M.D. Pa. 2012). The importance of showing a longstanding tradition in order to find a right of access varies by jurisdiction. Compare *Phila. Inquirer*, 906 F. Supp. 2d at 367–68 (citing *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1174 (3d Cir. 1986)) (“[T]he Third Circuit has emphasized the importance of the historical prong, . . . observing that ‘the role of history in the access determination is integral’ in part because of the Supreme Court’s own emphasis on historical access in *Globe Newspaper* and *Press-Enterprise I.*”) to *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 948 (9th Cir. 1998) and *Seattle Times Co. v. U.S. Dist. Ct.*, 845 F.2d 1513, 1516 (9th Cir. 1988) (noting that the historical prong of the *Press-Enterprise II* will “not automatically foreclose a right of access” for a failure to prove an “unbroken history of public access”).

<sup>214</sup> See *supra* Part I.A.; *Cal. First Amendment*, 299 F.3d at 875–76.

<sup>215</sup> See *Cal. First Amendment*, 299 F.3d at 875.

<sup>216</sup> See *id.* at 875–76; John Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMM. L.J. 355, 368–72 (1993) (every death penalty states requires official witnesses to be present at each execution); LOUIS MASSUR, *rites of execution*, 114–16 (1989) (even after public executions ceased in the United States, the press was still allowed to attend executions).



Additionally, throughout the eighteenth, nineteenth, and even twentieth centuries, details about the methods of executions were also made public. Some states supplied information via public accounts about the manufacturers of and the types of rope used in hangings.<sup>217</sup> Public records revealed the name of the company that supplied cyanide for Nevada's gas chambers, and newspapers reported on the chambers' size, cost, and makeup.<sup>218</sup> States like New York engaged in public debate about the type of electricity and equipment used in electrocutions.<sup>219</sup>

Moreover, from the advent of lethal injection as a permissible method of execution, states developed and published protocols detailing the drugs to be used in the executions.<sup>220</sup> In some instances, states have released information about a drug's manufacturer, National Drug Code, lot number, batch number, and expiration date.<sup>221</sup> The closely protected secrecy of such information is, in most states, a recent development, and one that appears to correlate with problems in obtaining drugs from well-regulated sources.<sup>222</sup> The historical tradition, however, trends towards making information about the method of execution accessible to the public.

Lethal injection is a more complex method of execution than hanging, firing squad, gas chamber, or electrocution.<sup>223</sup> Because of the complexity of

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<sup>217</sup> See *John Brown, Hanged with Kentucky Rope*, U. KY. LIBR., [http://nkaa.uky.edu/record.php?note\\_id=1625](http://nkaa.uky.edu/record.php?note_id=1625) (last visited Jan. 26, 2016) (explaining that different ropes were submitted for use in the hanging of John Brown, were displayed to the public before the execution, and the strongest and most durable was selected); Chris Woodyard, *Enough Rope: The Hangman's Rope in the Press*, HAUNTED OHIO (Jan. 19, 2013), <http://hauntedohiobooks.com/news/enough-rope-the-hangmans-rope-in-the-press/> (summarizing news reports describing the types of ropes used in executions and the suppliers who produced them).

<sup>218</sup> SCOTT CHRISTIANSON, *THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER* 76–79 (2010).

<sup>219</sup> STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 178–85 (2002).

<sup>220</sup> See, e.g., Denno, *supra* note 33, at 97–98 (describing the development of Oklahoma's lethal injection statute, which listed the quantity and types of drugs to be used in lethal injections).

<sup>221</sup> *Wood v. Ryan*, 759 F.3d 1076, 1084 (9th Cir. 2014), *vacated*, 135 S. Ct. 21 (2014), (noting that these details about Arizona's pentobarbital supply were made available to the public following litigation).

<sup>222</sup> See *infra* Appendix; see also Denno II, *supra* note 36, at 1376–81.

<sup>223</sup> Unlike the other methods of execution that have been used throughout history, which cause certain, quick death, lethal injection depends on the reaction of drugs within the body, which may vary person-to-person and depends on a host of different factors, including: the type of drugs used, the number of drugs used, the concentration of drugs used, the order in which different drugs are injected, the relative ease or difficulty of establishing an intravenous line into a condemned prisoner's body, etc. Cf. AMNESTY INTERNATIONAL, *supra* note 98, at 3, 5, 10 (detailing the diversity of methods of lethal injections and the numerous ways in which a lethal injection can be botched).

execution by lethal injection, some judges and legal scholars have drawn an artificial distinction between information about method of execution and the details about the protocols and drugs that comprise the means of carrying out the method.<sup>224</sup> In her recent article, Mary Fan, a former prosecutor and current professor of criminal law at the University of Washington, outlines the tradition of confidentiality surrounding aspects of state-sponsored executions.<sup>225</sup> Fan argues that though executions have historically been public events, the identities of executioners were traditionally shielded.<sup>226</sup> Additionally, she adds, no tradition exists to reveal the maker of the rope, scaffold, gas chamber, or gun used to execute a condemned prisoner.<sup>227</sup>

However, the drugs and drug combinations used in lethal injections affect the condemned prisoner's experience of dying to a much greater extent than other means of execution, where the type of rope or gun or supplier of electricity or gas does not intimately impact the resultant experience of dying and death. Insufficient sedatives, for instance, may leave a prisoner still conscious when the more painful, death-inflicting drugs enter the body.<sup>228</sup> As discussed *supra* in Part I.C., lethal injections are more likely than any other execution method to be botched.<sup>229</sup> The high rate in large part results from the varying effects of the drugs and drug protocols used in lethal injections.<sup>230</sup>

With other forms of execution, knowing the method of execution was akin to understanding the method of execution. With lethal injection, however, additional information is required to understand the method of execution.<sup>231</sup> The public can only monitor, regulate, improve, or condemn the process if they know not only that a prisoner is to be poisoned but how the prisoner is to be poisoned—with what drugs, in what quantities and

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<sup>224</sup> See, e.g., Fan, *supra* note 211, at 451–52.

<sup>225</sup> *Id.* at 451.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 451–52. This is an argument also expressed in Judge Bybee's dissent in *Wood*. See *Wood v. Ryan*, 759 F.3d 1076, 1094–96 (9th Cir. 2014) (Bybee, J., dissenting).

<sup>228</sup> See, e.g., *Taylor v. Crawford*, 487 F.3d 1072, 1080 (8th Cir. 2007); *Morales v. Tilton*, 465 F. Supp. 2d 972, 978 (N.D. Cal. 2006) (noting that the parties—a condemned prisoner and the California DOC—agreed that it would be unconstitutional to inject a conscious person with pancuronium bromide and potassium chloride, but that use of such drugs would be acceptable if the condemned prisoner was under a sufficient level of anesthetic as to render him unconscious). Additionally, some drugs may have a “paradoxical effect” in which certain patients are not sedated and instead “experience agitation, combativeness, and anxiety” in reaction to the drugs. Petition for Writ of Certiorari at 6–9, *Glossip v. Gross*, 135 S. Ct. 2726 (2016) (No. 14-7955).

<sup>229</sup> See *supra* Part I.C.

<sup>230</sup> AMNESTY INTERNATIONAL, *supra* note e98, at 5.

<sup>231</sup> *Id.*

concentrations, and from what sources.

Even though there is not a particularly strong tradition of making available details about suppliers of execution materials, the tradition prong need not be dispositive.<sup>232</sup> A failure to prove an “unbroken history of public access . . . should not automatically foreclose a right of access.”<sup>233</sup> Thus, courts should consider the second prong: whether granting a right of access to execution-related information would have a significant, positive effect on the functioning of state-sponsored executions. As discussed *infra*, access to information about execution drugs and drug suppliers benefits the public, as the information enables the public to engage in important and informed discussions of states’ continued use of the death penalty as a means of punishment.

*b. Access Plays a Significant Positive Role in the Functioning of the Execution Process*

In addition to the “historical,” or “experience,” prong of the *Press-Enterprise II* “logic and experience” test,<sup>234</sup> proponents of the right of access must show that granting the right would have a significant positive effect on the function of the process in question (the “logic” prong).<sup>235</sup> The Third Circuit, drawing on the Supreme Court’s analysis in *Richmond Newspapers*,<sup>236</sup> identified six public interests that may be served by allowing public access to a governmental proceeding (though these interests have been applied outside of the judicial context as well):

- (1) [P]romotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system, (2) promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings, (3) providing a significant community therapeutic value as an outlet for community concern, hostility, and emotion, (4) serving as a check on corrupt practices by exposing the judicial process to public scrutiny, (5) enhancement of the performance of all involved, and (6) discouragement of perjury.<sup>237</sup>

Granting a right of access to information about execution protocols and drug sources undoubtedly serves many of these interests.

First, such information promotes informed public discussion about the use of lethal injection. As the Ninth Circuit noted in *California First*

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<sup>232</sup> See *Seattle Times Co. v. U.S. Dist. Ct.*, 845 F.2d 1513, 1516 (9th Cir. 1988).

<sup>233</sup> *Id.*

<sup>234</sup> See *supra* Part III.A. for a discussion of this test.

<sup>235</sup> *Press-Enter. II*, 478 U.S. 1, 8–9 (1986).

<sup>236</sup> *U.S. v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982).

<sup>237</sup> *Phila. Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 368 (M.D. Pa. 2012) (citing *United States v. Simone*, 14 F.3d 833, 839 (3d Cir. 1994)).

*Amendment Coalition v. Woodford*, “Independent public scrutiny . . . plays a significant role in the proper functioning of capital punishment. An informed public debate is critical in determining whether execution by lethal injection comports with the evolving standards of decency which mark the progress of a maturing society.”<sup>238</sup> The Ninth Circuit found that citizens must have access to reliable information about executions’ initial procedures in order to determine whether lethal injections are administered in fair, humane ways.<sup>239</sup>

While *California First Amendment* referred specifically to allowing the public and its surrogate, the media, to witness initial procedures such as establishing the intravenous line through which lethal drugs will be administered, the argument holds no less true for allowing the public access to information about the drugs being used.<sup>240</sup> The efficacy of the drugs strongly impacts whether lethal injection “comports with ‘the evolving standards of decency’” that led our society away from arguably less humane methods of execution.<sup>241</sup> Factors such as the type of drugs, the dosage, the expiration date, evidence that the drugs were properly manufactured and stored, and the combination of drugs all contribute to the drugs’ efficacy.<sup>242</sup> Given the incidence of lethal injections that do not go as planned, the public may rightly mistrust prison administrators’ assurances that the drugs being used are safe and properly manufactured.<sup>243</sup> Additionally, requiring disclosure of information about the drugs and drug protocols could check illegal efforts to obtain drugs,<sup>244</sup> and may encourage state DOCs and drug manufacturers and suppliers to ensure their drugs are of high quality.

When the Ninth Circuit concluded in *Wood v. Ryan* that the Arizona DOC needed to reveal information about its drug sources, the court was specifically thinking about the safety and reliability of Arizona’s

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<sup>238</sup> 299 F.3d 868, 876 (9th Cir. 2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*; see also *Sepulvado v. Jindal*, 739 F.3d 716, 722 n.6 (5th Cir. 2013) (per curiam) (Dennis, J., dissenting) (interpreting *California First Amendment Coalition* to suggest “that the right to public trials extends to require states to make the details of their lethal-injection formulas available to death-row inmates and the public”).

<sup>241</sup> *Id.* (quoting *Trop*, 356 U.S. at 101). For an alternative opinion on the relative humaneness of various forms of execution, see Judge Alex Kozinski’s dissent from the denial of rehearing en banc in *Wood v. Ryan*, 759 F.3d 1076, 1102–03 (9th Cir. 2014) (Kozinski, C.J., dissenting).

<sup>242</sup> See AMNESTY INTERNATIONAL, *supra* note 98, at 10; CONSTITUTION PROJECT, *supra* note 49, at 138–40, 142.

<sup>243</sup> See *supra* Part I.C.

<sup>244</sup> See *Ericson*, *supra* note 2; *Lhor*, *supra* note 47.

protocol.<sup>245</sup> The court noted that Arizona planned to use an untested protocol, adding that “recent history in Arizona does not provide a reliable source of data as to its current method of execution, underscoring the need for transparency.”<sup>246</sup> The court appeared troubled by the risks associated with untested, unreliable methods, as evidenced by recent botched executions in other states:

Given . . . the factual backdrop of the past six months in particular, more information about the drugs used in lethal injections can help an alert public make better informed decisions about the changing standards of decency in this country surrounding lethal injection. Knowing the source and manufacturer of the drugs, along with the lot numbers and NDCs, allows the public to discern whether state corrections departments are using safe and reliable drug manufacturers.<sup>247</sup>

In March 2015, a Mississippi Chancellor followed the Ninth Circuit’s lead and ordered the Mississippi DOC to release information about its drug source.<sup>248</sup> The Mississippi court plainly noted that “[t]he names of those involved,” including “the executioner [and] the pharmacy who provides the lethal drugs . . . may be of public interest.”<sup>249</sup> So though states may be concerned about the safety of members of the execution team, courts “cannot allow fear to control the flow of information from a public agency simply because of the controversial nature of the information.”<sup>250</sup>

The Ninth Circuit also concluded that information about the

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<sup>245</sup> See 759 F.3d 1076, 1087 (9th Cir. 2014). The Supreme Court vacated the Ninth Circuit’s decision in *Wood* without hearing or analysis. *Ryan v. Wood*, 135 S. Ct. 21 (2014). Without analysis, one can only speculate on the Court’s rationale for vacating the preliminary injunction against execution. Notably, however, the Court seems disinclined to enjoin executions unless the Court has granted certiorari on a death penalty case. See *Warner v. Gross*, 135 S. Ct. 824 (2015) (denying a stay of execution to Charles Warner, a week prior to granting certiorari on his case); Order Granting Stay of Execution, *Glossip v. Gross*, No. 14-7955 (Jan. 28, 2015) (granting stays of execution to the remaining plaintiffs in *Glossip* pending the outcome of the case; Warner had already been executed by that point). Thus, I explore the Ninth Circuit’s well-analyzed opinion, despite the fact that *Wood* was vacated. I further note that several of the Supreme Court justices had weighed in on recent cases involving lethal injection with similar concerns to the Ninth Circuit’s concerns in *Wood*. See, e.g., *Warner v. Gross*, 135 S. Ct. 824 (2015) (Sotomayor, J., dissenting) (raising concerns about the safety and efficacy of Oklahoma’s lethal injection protocol); *Glossip v. Gross*, 135 S. Ct. 2726, 2780–97 (2015) (Sotomayor, J., dissenting) (same).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 1085–86.

<sup>248</sup> Order and Opinion at 8, *Roderick & Solange MacArthur Justice Ctr. v. Miss. Dep’t of Corr.*, No. G2014-1885 O/3 (Ch. Ct. Miss. Mar. 6, 2015), [http://neworleans.macarthurjusticecenter.org/uploads/rsmjc-neworleans/documents/chancery\\_court\\_judgment\\_030615.pdf](http://neworleans.macarthurjusticecenter.org/uploads/rsmjc-neworleans/documents/chancery_court_judgment_030615.pdf).

<sup>249</sup> *Id.* at 6.

<sup>250</sup> *Id.* at 7.

qualifications of members of the execution team “will give the public more confidence than a state’s generic assurance that executions will be administered safely and pursuant to certain qualifications and standards.”<sup>251</sup> In other words, giving the public proof of an execution’s safety, rather than trying to pacify the public with “generic assurances,” will best ensure the public perception of fairness in executions. While the Ninth Circuit specifically called for disclosure of the qualifications of the people actually performing the execution, the argument easily applies to the qualifications of those manufacturing the drugs that will be used for the execution. After all, who performs an execution is not as important to the condemned prisoner’s experience as the drugs actually injected into his body that effectuate his death. Improper drug dosages or concentrations, expired drugs, and contaminated drugs risk causing the condemned prisoner excruciating pain.<sup>252</sup> Revealing the qualifications of the people tasked with compounding the drugs allows people besides prison officials to check that drugs are safely and properly compounded. Attorneys, journalists, and the public can use information about drug suppliers to determine whether execution drugs are made by people qualified to compound drugs in clean facilities that safely store drugs and avoid cross-contamination.

In *Wood*, Judge Bybee’s dissent questions whether disclosure of such information truly plays a significant, positive role in the functioning of executions.<sup>253</sup> Judge Bybee shared the Arizona DOC’s worry that mandating disclosure could cause manufacturers and suppliers to cease providing drugs to the DOC, thereby hobbling the state’s ability to carry out lawful executions.<sup>254</sup> Judge Bybee worried that “[i]nmates may suffer if the State is forced to turn to less reliable execution methods that might inflict unnecessary pain.”<sup>255</sup> However, the trial record lacked evidence to support the argument that sources would dry up if disclosure was mandated.<sup>256</sup> Other courts have also seen a lack of evidence supporting that argument.<sup>257</sup>

Additionally, Judge Bybee’s concern that states would be forced into using “less reliable execution methods” has already come to pass, not because of secrecy laws, but because of traditional pharmacies’ reluctance

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<sup>251</sup> *Wood*, 759 F.3d at 1086.

<sup>252</sup> See *supra* Part I.C.

<sup>253</sup> 759 F.3d at 1096–1100 (Bybee, J., dissenting).

<sup>254</sup> *Id.* at 1096–97.

<sup>255</sup> *Id.* at 1097.

<sup>256</sup> *Id.* at 1086 (majority opinion).

<sup>257</sup> See e.g., Order and Opinion, *Roderick & Solange MacArthur Justice Ctr. v. Miss. Dep’t of Corr.*, No. G2014-1885 O/3 (Ch. Ct. Miss. Mar. 6, 2015).

to have their drugs used in executions.<sup>258</sup> Today's methods of execution by lethal injection raise the risk of "inflict[ing] unnecessary pain" because they are less reliable than the methods approved by *Baze*, given the dramatic changes in drug supply since *Baze* and the risks associated with one of the primary current sources—compounding pharmacies.<sup>259</sup> More complete disclosure about the drugs used in any given execution allows condemned prisoners and the public to scrutinize the existing methods of execution to determine their reliability.

Judge Bybee also argued that disclosing information about the development of drug protocols would not impact public dialogue in any significant way.<sup>260</sup> Contrary to Judge Bybee's argument, however, information about a protocol's development does provide significant information beyond what is contained within the protocol itself. For instance, information about a protocol's development would allow the public to evaluate what kinds of tests were done to ensure the procedure's efficacy, explore whether the protocol designers focused more on cost or safety, and consider whether the protocol designers sought or received feedback from doctors.<sup>261</sup> Particularly when states decide to use untested protocols for execution (e.g., Ohio's execution of Dennis McGuire),<sup>262</sup> the public has an interest in evaluating execution protocols.

Several courts have determined that the media and witnesses have a right to view the entire execution, including initial procedures, such as establishing an intravenous line.<sup>263</sup> A right to know important details about the actual drugs pumped into the condemned prisoner logically

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<sup>258</sup> See *supra* Part I.B.; Bailey Elise McBride & Nomaan Merchant, *Scant Evidence of Threats to Execution Drugmakers*, ASSOCIATED PRESS: BIG STORY (Apr. 3, 2014), <http://bigstory.ap.org/article/scant-evidence-threats-execution-drugmakers>.

<sup>259</sup> See *supra* Part I.B.

<sup>260</sup> *Wood*, 759 F.3d at 1100 (Bybee, J., dissenting).

<sup>261</sup> See, e.g., Denno, *supra* note 33, at 113–14 (noting that three medical professionals refused to support the recommendations of a Florida commission, on which they served, that evaluated Florida's execution drug protocol in 2007). Subsequent evaluation of the Florida commission's recommendations suggests that they were grossly inadequate to fix the problems in Florida's protocol. *Id.* at 101.

<sup>262</sup> See Denno II, *supra* note 36, at 1355, 1357, 1348–50; CONSTITUTION PROJECT, *supra* note 49, at 148–149, 153; Welsh-Huggins, *supra* note 88.

<sup>263</sup> See *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 877 (9th Cir. 2002) ("[T]he public enjoys a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, including those 'initial procedures' that are inextricably intertwined with the process of putting the condemned inmate to death."); *Phila. Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 371 (M.D. Pa. 2012) ("[P]ermitt[ing] the press to view the entire execution without visual or auditory obstruction contributes to the proper functioning of the execution process.").

accompanies the right to observe all initial execution procedures. After all, data about the drugs and drug protocols are as important for the public and the court's ability to evaluate lethal injection as information about initial procedures. In fact, this data is of particular importance now that states have such diverging protocols, in stark contrast to the similarity of state protocols pre-*Baze*.<sup>264</sup>

*c. A Call for Access in Glossip v. Gross*

Several justices recently expressed their interest in details about execution drugs in the 2015 case *Glossip v. Gross*.<sup>265</sup> Richard Glossip, Charles Warner, and two other condemned prisoners in Oklahoma brought an Eighth Amendment challenge to the use of midazolam in Oklahoma's execution protocol.<sup>266</sup> A week prior to granting certiorari, the Court denied Charles Warner's application for a stay of his execution.<sup>267</sup> Justice Sotomayor dissented, detailing concerns about whether midazolam works as expected.<sup>268</sup> Oklahoma executed Charles Warner on January 15, 2015, during which he verbally expressed that he was experiencing pain.<sup>269</sup> Five days after the Court granted certiorari, it granted stays of execution pending the Court's decision on the merits for the remaining three prisoners in the suit.<sup>270</sup>

The Court's willingness to hear the Eighth Amendment arguments against lethal injection underscores the critical importance of ensuring a First Amendment right of access to information about executions. Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, has expressed concern about the medical science backing Oklahoma's (and Florida's) execution protocol.<sup>271</sup> She noted that the Eighth Amendment questions "are especially important now, given States' increasing reliance on new and scientifically untested methods of execution."<sup>272</sup> She also expressed skepticism about the State of Oklahoma's claims about the reliability and

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<sup>264</sup> Denno II, *supra* note 36, at 1380.

<sup>265</sup> 135 S. Ct. 2726, 2735 (2015).

<sup>266</sup> *Id.* at 2737.

<sup>267</sup> See Warner v. Gross, 135 S. Ct. 1173 (2015) (granting certiorari on Jan. 23, 2015); Warner v. Gross, 135 S. Ct. 824 (2015) (denying application for stays of execution on Jan. 15, 2015).

<sup>268</sup> Warner, 135 S. Ct. at 827 (Sotomayor, J., dissenting from denial of stay of execution).

<sup>269</sup> Ford, *supra* note e87.

<sup>270</sup> See Glossip v. Gross, 135 S. Ct. 1197 (2015) (granting stays of execution); Warner, 135 S. Ct. at 1173.

<sup>271</sup> Warner, 135 S. Ct. at 827.

<sup>272</sup> *Id.* at 828.



efficacy of the state's protocol, as an expert for the State "appeared to rely primarily on the Web site [www.drugs.com](http://www.drugs.com)" rather than on any true scientific data in concluding that midazolam was safe.<sup>273</sup>

Justice Alito's majority opinion and Justice Sotomayor's dissent in *Glossip* both involved heavy scientific analysis about the dosage and effects of midazolam.<sup>274</sup> The emphasis on science in their opinions suggests the Court is aware that science matters. In *Glossip*, the issue was whether high doses of midazolam actually worked to render a condemned prisoner insensitive to pain, or whether midazolam has a ceiling effect after which one may regain pain sensitivity.<sup>275</sup> Justice Sotomayor noted that states' various safeguards to ensure safe administration of drugs—by, for instance, requiring executioners to establish back-up IV lines—do not protect against the risk of pain if the drug itself is problematic.<sup>276</sup>

Justice Sotomayor's skepticism about the medical evidence on which states currently rely in developing drug protocols echoes concerns shared by condemned prisoners and the public.<sup>277</sup> A right of access to information about the drugs could allay, or give teeth to, such concerns. The *Glossip* case, however, did not explicitly address or create a right of access to this information.

## 2. Secrecy Laws Impermissibly Burden the Right of Access

Once a qualified right of access has been established through the "logic and experience" test, the regulation or law seeking to limit the exercise of that right generally undergoes strict scrutiny analysis.<sup>278</sup> The right may be overcome only by an "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."<sup>279</sup> When under review by a court, the proponents of the law or regulation must specify this "higher value[]" interest "with particularity."<sup>280</sup>

State legislators and prison officials have advanced several reasons for

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<sup>273</sup> *Id.* at 827.

<sup>274</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2739–46, 2780–92 (2015).

<sup>275</sup> *See id.* at 2742–44 (majority opinion), 2783–91 (Sotomayor, J., dissenting).

<sup>276</sup> *Id.* at 2791–92 (Sotomayor, J., dissenting).

<sup>277</sup> *See infra* Parts IV.B.1. and IV.B.2.

<sup>278</sup> *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 877 (9th Cir. 2002). However, as noted in Section III.D, prison regulations generally undergo a more deferential analysis.

<sup>279</sup> *Press-Enter. I.*, 464 U.S. 501, 510 (1984).

<sup>280</sup> *CBS, Inc. v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985) (quoting *Press-Enter I.*, 464 U.S. at 510).

shielding information about drug sources and drug protocols, as discussed *supra* in Part II.B. In particular, they argue that secrecy protects the safety and professional reputations of drug suppliers.<sup>281</sup> Such an argument appears logical on its face. Capital punishment is indisputably controversial, and executions draw their share of protesters. Professional medical organizations such as the American Medical Association explicitly specify that a physician “should not be a participant in a legally authorized execution.”<sup>282</sup> As a result, members of the execution team may face harassment or professional censure for their involvement. However, Amnesty International indicates that no health professional, to its knowledge, has been disciplined by a professional body for participating in a lethal injection in breach of the professional body’s applicable ethical code.<sup>283</sup> The American Bar Association adds that no credible evidence of threats to execution drug suppliers has yet come to light, and that even if such threats were to arise, courts could craft remedies to protect individuals’ names, while allowing other relevant information to be accessible.<sup>284</sup>

States’ proffered reasons for limiting the right of access—protecting the safety and reputations of suppliers—are intended by lawmakers to ensure that prisons are able to find suppliers.<sup>285</sup> Lawmakers argue that prisons will be unable to find suppliers unless suppliers are permitted to supply execution drugs without publicly allying themselves with death rows.<sup>286</sup> However, these concerns also have not proven meritorious.<sup>287</sup> The majority in *Wood v. Ryan* noted that “the State can point to no evidence in the record to support its claim that pharmaceutical companies will stop providing drugs” if information about their qualifications or identities are revealed.<sup>288</sup> Nor did Arizona demonstrate in *Wood* that no other alternatives

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<sup>281</sup> See *supra* Part II.B. Other arguments advanced by state legislators and prison officials for shielding information about drug sources and drug protocols would not receive consideration by the courts because proponents of the law must specify their interests in the law with particularity. *CBS, Inc.*, 765 F.2d at 825. Possible reasons for secrecy statutes, such as a desire to obscure information from the public, are unlikely to ever be voiced by a proponent of a secrecy statute. See *supra* Part II.B.

<sup>282</sup> AMNESTY INTERNATIONAL, *supra* note 98, at 27. The American Nurses Association, American College of Physicians, American Public Health Association, National Association of Emergency Medical Technicians, American Society of Anesthesiologists, and American Psychological Association have all issued statements calling the participation of health officials in capital punishment unethical. See *id.* at 28–30.

<sup>283</sup> *Id.* at 31.

<sup>284</sup> SLOAN ET AL. *supra* note 120, at 12.

<sup>285</sup> See *Wood v. Ryan*, 759 F.3d 1076, 1086 (9th Cir. 2014).

<sup>286</sup> *Id.*

<sup>287</sup> See *id.*

<sup>288</sup> *Id.* at 1086.

would be available if some companies decided not to supply execution drugs.<sup>289</sup> Additionally, prison officials in Delaware and Georgia indicate no knowledge of threats made against pharmacies that supply or could supply execution drugs, and Texas and Oklahoma officials have offered “scant evidence to support their claim[s]” that such threats have been made.<sup>290</sup>

Furthermore, states’ interests in protecting drug suppliers do not outweigh the public’s great interest in complete and accurate information about the drugs being used in executions, particularly given the high bar of strict scrutiny. Information about the drug protocols and drug sources is crucial to evaluate whether lethal injection as it is used today (in contrast to lethal injection using *Baze*-approved drugs) comports with society’s “evolving standards of decency.”<sup>291</sup> Giving the public this information enables it to engage in independent evaluation of the drugs and drug sources, rather than relying on the word of prison officials. Independent public scrutiny of drug protocols and drug sources “safeguards the integrity” of the execution process,<sup>292</sup> because it provides an additional layer of scrutiny of new protocols; physicians and other people unaffiliated with state-sponsored executions could weigh in on the likely safety and efficacy of proposed execution protocols.

Further, transparency about the details of the execution method (e.g., the specifics of the drug protocols) “fosters an appearance of fairness.”<sup>293</sup> When information about the execution process is tightly guarded and unavailable for public review, the execution process itself becomes suspect, because the public becomes beholden to the very people conducting executions for assurances that the executions are fairly performed.<sup>294</sup> But punishment of criminals serves the public, not just the jailer or executioner. The public has an interest in ensuring that the punishments society metes out are fairly administered. Without adequate information about the drugs used in lethal injection executions, the public is handicapped in its ability to check for fair administration of the death penalty.

In *Globe Newspaper*, the Court found that the public’s right to access criminal trials outweighed even the physical and psychological health interests of child rape victims.<sup>295</sup> Surely the public’s right to effectively evaluate the application of the state’s most severe punishment—a

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<sup>289</sup> *Id.*

<sup>290</sup> *McBride & Merchant*, *supra* note 258.

<sup>291</sup> *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 884.

<sup>295</sup> *Globe Newspaper v. Super. Ct.*, 457 U.S. 596, 607–08 (1982).

punishment that takes the life of one of its own citizens—outweighs the unsubstantiated safety interests of voluntary participants in executions.

## B. THE RIGHT OF ACCESS AS APPLIED TO EXECUTION PROTOCOLS AND SOURCES

### *1. Cases Brought by Prisoners*

Recently, several condemned prisoners have challenged secrecy statutes, seeking information from prisons about the drugs the state planned to use in their executions, with mixed results.<sup>296</sup>

In June 2014, the Eleventh Circuit decided *Wellons v. Commissioner, Georgia Department of Corrections*.<sup>297</sup> Condemned prisoner Marcus Wellons sought a stay of execution until he obtained information from the Georgia DOC about the drug the DOC expected to use in his execution—beyond the copy of the one-drug protocol with which they supplied him.<sup>298</sup> Wellons argued that the pentobarbital the DOC claimed it had in its possession may actually have been “manufactured from unknown ingredients and in unknown circumstances by a compounding pharmacy.”<sup>299</sup> While his argument was primarily based on the Eighth Amendment, he also brought First, Fourth, and Fourteenth Amendment challenges to Georgia’s secrecy statute.<sup>300</sup> The Eleventh Circuit agreed with the district court’s determination that Wellons did not, as an individual, have a First, Fifth, or Fourteenth Amendment right of access to the information he sought.<sup>301</sup> The court also agreed with the district court that openness of government operations had First Amendment implications.<sup>302</sup> However, Wellons’ argument for openness relied on cases about the public’s need to be informed, rather than the individual’s need for

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<sup>296</sup> See *Wood v. Ryan*, 759 F.3d 1076, 1087 (9th Cir. 2014); *Wellons v. Comm’r, Ga. Dept. of Corr.*, 754 F.3d 1260 (11th Cir. 2014). In addition to these Ninth and Eleventh Circuit cases, an appeal is pending in the Sixth Circuit, brought by three death-row inmates in Ohio who are challenging the constitutionality of Ohio’s new secrecy laws. Alan Johnson, *Federal judge upholds execution-drug law*, COLUMBUS DISPATCH (Oct. 29, 2015, 4:36 PM), [http://www.dispatch.com/content/stories/local/2015/10/29/execution\\_secrecy\\_ruling.html](http://www.dispatch.com/content/stories/local/2015/10/29/execution_secrecy_ruling.html); Jeremy Pelzer, *Ohio Death-Row Inmates Appeal Lawsuit Challenging New Execution Secrecy Law*, CLEVELAND.COM (Mar. 16, 2015), [http://www.cleveland.com/open/index.ssf/2015/03/ohio\\_death-row\\_inmates\\_appeal.html](http://www.cleveland.com/open/index.ssf/2015/03/ohio_death-row_inmates_appeal.html).

<sup>297</sup> 754 F.3d 1260 (11th Cir. 2014).

<sup>298</sup> *Id.* at 1262.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 1266.

<sup>301</sup> *Id.* at 1266–67.

<sup>302</sup> *Id.*

information.<sup>303</sup> As an individual, the district court held, and the majority agreed, Wellons was not entitled to the information he sought.<sup>304</sup> The court's decision suggests that members of the public or the press may have better standing to assert the right of access than individual prisoners.<sup>305</sup>

In July 2014, the Ninth Circuit decided a case expressly premised on a condemned prisoner's assertion of the public right of access.<sup>306</sup> In *Wood v. Ryan*, the court carefully weighed Wood's right of access argument, putting it through the steps of the *Press-Enterprise II* "complementary considerations" test.<sup>307</sup> The court concluded that Wood had a strong likelihood of success on the merits of his claim.<sup>308</sup> But the Supreme Court later vacated the Ninth Circuit's decision, albeit without making a ruling on Wood's First Amendment right of access argument.<sup>309</sup>

## 2. Cases Brought by the Press

The right of access is a right held by the public, rather than by individuals.<sup>310</sup> As a result, judges have been reluctant to apply the right to individual prisoners. For instance, the Eleventh Circuit held in *Wellons* that the right "turn[s] on the public's, rather than the individual's, need to be

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<sup>303</sup> *Id.* at 1266.

<sup>304</sup> *Id.* at 1266–67. Judge Charles Wilson wrote a separate concurrence "to highlight the disturbing circularity problem created by Georgia's secrecy law regarding methods of execution in light of [Eleventh Circuit] precedent." *Id.* at 1267–68 (Wilson, J., concurring in judgment). Judge Wilson noted that difficulty in obtaining information about Georgia's execution protocol made it "nearly impossible" for Wellons or other condemned Georgia prisoners to meet their burden of proving an "objectively intolerable risk of harm" from the proposed execution protocol. *Id.* at 1268. Judge Wilson questioned the "need to keep information relating to the procurement and nature of lethal injection protocol concealed from [the condemned prisoner], the public, and this court, especially given the recent much publicized botched execution in Oklahoma. Unless judges have information about the specific nature of a method of execution, we cannot fulfill our constitutional role of determining whether a state's method of execution violates the Eighth Amendment's prohibition against cruel and unusual punishment before it becomes too late." *Id.*

<sup>305</sup> See *infra* Part IV.B.2. for further discussion.

<sup>306</sup> *Wood v. Ryan*, 759 F.3d 1076, 1087 (9th Cir. 2014) ("Wood is seeking to enforce a public, First Amendment right.").

<sup>307</sup> *Id.* at 1082–86 (citing *Press-Enter. II*, 478 U.S. 1, 8–9 (1986)).

<sup>308</sup> See *id.* at 1086. Ultimately, the Ninth Circuit found the district court had abused its discretion in denying Wood's preliminary injunction request. *Id.* at 1088. The Ninth Circuit declined to rehear Wood's case en banc. *Id.* at 1101–02 (order denying petition for rehearing en banc).

<sup>309</sup> *Ryan v. Wood*, 135 S. Ct. 21 (2014) (vacating the Ninth's Circuit's judgment granting a conditional preliminary injunction).

<sup>310</sup> *Wood*, 759 F.3d at 1092 (Bybee, J. dissenting) (citing *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 873 (9th Cir. 2002)).

informed so as to foster debate.”<sup>311</sup> Judge Bybee, in his dissent in *Wood*, stated, “The existence and scope of that right could be fully litigated by a member of the public who feels he has been unconstitutionally deprived of the information at issue.”<sup>312</sup>

Members of the media may serve as the members of the public that Judge Bybee invited to “fully litigate” the issue of access.<sup>313</sup> The press’s right to “view events inside prison walls” is limited only insofar as the right is “co-extensive with the public’s right to the same information”,<sup>314</sup> “the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”<sup>315</sup>

However, the press is undeniably well situated to inform the public about details of executions. An informed public relies largely on the press for its information, particularly when it comes to information pertaining to the prison system.<sup>316</sup> Indeed, in many respects, the media “serves as the public’s surrogate.”<sup>317</sup> Justice Thurgood Marshall argued in 1976 that “the constitutionality of the death penalty turns . . . on the opinion of an *informed* citizenry.”<sup>318</sup> Allowing the press to assert its right of access to information about execution protocols and drug sources would enable the public to engage in an informed discussion of governmental affairs, particularly of the use of the death penalty.

Members of the press in several states have taken up the challenge by filing First Amendment right of access suits seeking information about execution protocols and drug sources.<sup>319</sup> For instance, in May 2014, five

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<sup>311</sup> *Wellons v. Comm’r, Ga. Dept. of Corr.*, 754 F.3d 1260, 1266 (11th Cir. 2014).

<sup>312</sup> *Wood*, 759 F.3d at 1101 (Bybee, J. dissenting).

<sup>313</sup> *Id.*

<sup>314</sup> *Cal. First Amendment Coal. v. Calderon*, 150 F.3d 976, 982 (9th Cir. 1998).

<sup>315</sup> *Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972).

<sup>316</sup> *Pell v. Procunier*, 417 U.S. 817, 841 (1974) (Douglas, J., dissenting) (“The average citizen is most unlikely to inform himself about the operation of the prison system by requesting an interview with a particular inmate with whom he has no prior relationship. He is likely instead, in a society which values a free press, to rely upon the media for information.”).

<sup>317</sup> *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002).

<sup>318</sup> *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting) (emphasis in original). Marshall further observed that the public was “largely unaware of the information critical to a judgment on the morality of the death penalty,” citing a study which found that the opinions of an informed public on the consequences and effects of capital punishment differed significantly from the opinions of an uninformed public. *Id.* It is worth noting that the *Gregg* decision predated the advent of lethal injection. See *Baze v. Rees*, 558 U.S. 35, 42 (2008) (noting that Oklahoma introduced the first lethal injection bill in 1977, one year after *Gregg*).

<sup>319</sup> See, e.g., *Chester v. Wetzel*, No. 1:08-cv-01261, 2015 WL 632374, at \*1 n.1 (M.D.

media organizations filed suit against the State of Missouri, requesting that the Missouri DOC release information about the source of its lethal injection drugs.<sup>320</sup> In July 2015, a Missouri circuit court judge agreed that the Missouri DOC was not authorized to withhold records about the pharmacies and laboratories that supply, compound, and test lethal injection drugs for Missouri, though the court's finding was based on violations of the state sunshine laws; the court did not address the First Amendment claim.<sup>321</sup>

Additionally, in September 2014, four newspapers, intervening in a prisoner class action, asked a federal judge to unseal court records containing information about the source of drugs used in lethal injections in Pennsylvania.<sup>322</sup> And in October 2014, six media organizations filed suit against the Arizona DOC, requesting "information about the source, composition, and quality" of drugs that have been and will be used in executions, as well as information about the qualifications of members of the execution team.<sup>323</sup>

As the American Civil Liberties Union, writing on behalf of the press interveners in the Pennsylvania prisoner suit, argued in *Chester v. Wetzel*, "[t]he purpose of the First Amendment right of access is to facilitate public scrutiny of government."<sup>324</sup> They pointed out that in an earlier case, the court had decided that allowing the press to examine "all phases of the execution contributes to the proper functioning of the execution process, in part because it allows the press to contribute to an informed discussion of the Commonwealth's lethal injection procedures."<sup>325</sup> In February 2015, the district court judge in *Chester* granted summary judgment on behalf of the state, determining that Pennsylvania's lethal injection protocol is not "sure

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Pa. 2015); *Guardian News & Media LLC v. Mo. Dep't of Corr.*, No. 14AC-CC00251 (Mo. Cir. Ct., filed May 15, 2014); Complaint at ¶1, *Guardian News & Media LLC v. Ryan*, No. 2:14-cv-02363, 2014 WL 5397794 (D. Ariz., filed Oct. 23, 2014). Cf. *Petition, Reporters Comm. for Freedom of the Press v. Mo. Dep't of Corr.*, No. 14AC-CC002254 (Mo. Cir. Ct., July 15, 2015) (bringing a similar claim to the Missouri *Guardian News & Media* case but only under the Sunshine Law).

<sup>320</sup> *Petition, Guardian News & Media*, No. 14AC-CC00251 at 15–17.

<sup>321</sup> *Id.*

<sup>322</sup> *Chester*, 2015 WL 632374, at \*1 n.1.

<sup>323</sup> Complaint, *Guardian News & Media*, 2014 WL 5397794 at ¶15. As of March 2016, the case is still pending.

<sup>324</sup> Memorandum of Law in Support of Intervenor's Emergency Motion for Order to Unseal and to Prohibit Future Sealing of Documents Disclosing Suppliers of Drugs to be Used for Lethal Injection, 16. *Chester v. Wetzel*, No. 1:08-cv-1261 (filed 2014).

<sup>325</sup> *Id.* at 13 n.4 (citing *Phila. Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 371 (M.D. Pa. 2012)).

or very likely to” violate the Eighth Amendment.<sup>326</sup> Notably, Judge Yvette Kane left the case open “for the sole purpose of adjudication of the merits of the Intervenor’s pending motion to unseal.”<sup>327</sup> For Judge Kane, at least, the argument for a public right of access to information about Pennsylvania’s execution procedures deserved greater consideration than the condemned prisoners’ Eighth and Fourteenth Amendment arguments.

#### CONCLUSION

Capital punishment is “the most serious punishment a state can exact from a criminal defendant.”<sup>328</sup> As such, it deserves high levels of informed public scrutiny. Particularly as states amend their lethal injection protocols, and as prisons face challenges in finding reliable sources of safe execution drugs, the public needs information from departments of corrections that will enable them to determine whether lethal injection drugs can be appropriately—and constitutionally—obtained and used. The First Amendment right of access grants the public the right to such information.

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<sup>326</sup> 2015 WL 632374, at \*10 (granting summary judgment in favor of Commonwealth of Pennsylvania).

<sup>327</sup> *Id.* (Order ¶3).

<sup>328</sup> *See* Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 873 (9th Cir. 2002).



## APPENDIX: SUPPLIER CONFIDENTIALITY LAWS

(The following chart details a sampling of states' secrecy laws and the years in which such laws were enacted.)

State	Enacted	Secrecy Law
Arkansas	2013	Provides that all execution procedures—including “[e]nsuring that the drugs and substances” needed for the execution are “available for use”—are not subject to disclosure under the Arkansas Freedom of Information Act. <sup>329</sup>
Arizona	2009	“The identity of executioners and other persons who participate or perform ancillary functions in an execution . . . is confidential and not subject to disclosure” under state public disclosure laws. <sup>330</sup>
Florida	2000	“Information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection” is confidential and exempt from the state public disclosure law. <sup>331</sup>
Georgia	2013	“[T]he identifying information of any person or entity . . . that manufacturers, supplies, compounds or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence” is a confidential state secret and cannot be disclosed even under judicial process. <sup>332</sup>
Louisiana	2010	“The provisions of the Administrative Procedure Act,” the state act on making information publicly available, “shall not apply to the procedures and policies concerning the process for implementing a sentence of death.” <sup>333</sup>

<sup>329</sup> S.B. 237, 89th Gen. Assemb. (Ark. 2013).

<sup>330</sup> ARIZONA REV. STAT. ANN. § 13-757(C) (2009).

<sup>331</sup> FLA. STAT. ANN. § 945.10(1)(g) (West 2014).

<sup>332</sup> GA. CODE ANN. § 42-5-36(d) (West 2013).

<sup>333</sup> LA. REV. STAT. §§ 15:569(D), 49:967(E)(3) (West 2010). As described *supra*, Introduction, in 2014, Louisiana considered implementing a much more far-reaching statute, but that bill was later withdrawn.

Missouri	2007	“The identities of members of the execution team, as defined by the execution protocol of the Department of Corrections, shall be kept confidential.” <sup>334</sup> The identities “shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity.” The Department of Corrections modified its execution protocol in 2013 to include suppliers of execution drugs as members of the execution team. <sup>335</sup>
Ohio	2014	Information about a person who “manufacturers, compounds, imports, transports, distributes, supplies, prescribes, prepares, administers, uses, or tests” any part of the drugs or medical supplies in an execution “shall be classified as confidential” and “shall not be subject to disclosure,” discovery, or subpoena except to confirm compliance with ethics laws and required state licensure. <sup>336</sup>
Oklahoma	2011	“The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.” <sup>337</sup>
South Dakota	2013	“The name, address, qualifications, and other identifying information related to the identity of any person or entity supplying or administering intravenous injection” is confidential. Disclosure of such information may not be authorized or ordered. Disclosure is a misdemeanor. <sup>338</sup>
Tennessee	2013	“[T]hose parts of the record identifying an individual or entity as a person or entity who or that has been or may in the future be directly involved in the process of executing a sentence of death shall be treated as confidential and shall not be open to public inspection.” “Entity” includes an entity “involved in the procurement or provision of chemicals, equipment, supplies and other items for use in carrying out a sentence of death.” <sup>339</sup>

<sup>334</sup> MO. REV. STAT. § 546.720 (2007).

<sup>335</sup> See *ACLU v. Lombardi*, No. 13-04223, 2014 WL 2479998, at \*3 (W.D. Miss. Apr. 3, 2014).

<sup>336</sup> OHIO REV. CODE ANN. § 2949.221(B) (West 2015) (effective Mar. 23, 2015).

<sup>337</sup> OKLA. STAT. tit. 22, § 1015(b) (2011).

<sup>338</sup> S. DAKOTA CODIFIED LAWS § 23A-27A-31.2 (2013).

<sup>339</sup> TENN. CODE ANN. § 10-7-504 (West 2013). The 2013 amendment expanded the

Texas	2015	Information about “any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution” is “excepted from the requirements” of the state public information act. <sup>340</sup>
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existing law to include protection for “entities.”

<sup>340</sup> V.T.C.A. § 552.1081 (effective September 1, 2015).